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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 102

KOPPERS COMPANY, INC., and THOMAS FLEXIBLE COUPLING COMPANY, Appellants

v.

UNITED STATES OF AMERICA, Appellee

On Appeal From the United States District Court for the Western District of Pennsylvania

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants Koppers Company, Inc. and Thomas Flexible Coupling Company appeal from the judgment of the United States District Court for the Western District of Pennsylvania, entered on January 24, 1962, directing appellant Koppers Company, Inc. to dispose of as a unit and as a going flexible coupling business all stocks and assets of appellant Thomas Flexible Coupling Company, and submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented by it.

OPINION BELOW

The opinion of the District Court is reported at 202 F. Supp. 437 (W. D. Pa. 1962) Copies of the Opinion, Findings of Fact, Conclusions of Law and Judgment are set forth in the Appendix, *infra*, pp. 13-58.

JURISDICTION

This is a civil action brought under § 15 of the Clayton Act, 38 Stat. 736, as amended (15 V.S.C. §25), to enjoin an alleged violation of amended § 7 of said Act (15 U.S.C. § 18). The District Court, in addition to filing its Opinion, entered Finding of Fact and Conclusions of Law on January 9, 1962 (Appendix, *infra*. pp. 13-58). On January 24, 1962, the District Court entered final judgment adverse to the defendants (Appendix, *infra*, pp. 63-64). The notice of appeal was filed March 9, 1962. The jurisdiction of this Court to review the judgment on direct appeal is conferred by § 2 of the Expediting Act, 32 Stat. 823, as amended. 15 U.S.C. § 29. *United States v. E. I. DuPont*, 366 U.S. 316.

STATUTE INVOLVED

The pertinent provisions of § 7 of the Clayton Act, 15 U.S.C. § 18, 38 Stat. 731 as amended by 64 Stat. 1125, are as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

QUESTIONS PRESENTED

1. Whether the District Court erred in failing to find and conclude that by reason of: (i) the physical differences between gear type couplings and disc type couplings, (ii) the absence of price sensitivity in the purchasing of disc type couplings and gear type couplings, (iii) the inability of customers to use gear type couplings and disc type couplings interchangeably in all but a small number of instances, (iv) the fact that the only evidence on the quantity of competition showed that only 8.19 per cent of the sales of the Thomas disc type couplings in 1960 were possibly competitive with the gear type couplings sales made by Koppers during 1960 and (v) the fact that every witness acknowledged that disc type couplings and gear type couplings are separate product lines, Koppers Company, Inc. and Thomas Flexible Coupling Company were not engaged

in the same line of commerce in their production of gear type couplings and disc type couplings, respectively.

2. Whether the District Court erred in failing to find that the purchasing of either disc type flexible couplings or gear type flexible couplings is governed by engineering considerations and that the choice of the type of coupling to be used is made by consumers on the basis of the decision made by their engineers as to which coupling will be most satisfactory for their own uses from an engineering viewpoint.

3. Whether the District Court erred in considering that 8.19 per cent of Thomas 1960 sales were possibly competitive with the sales of Koppers gear type couplings in 1960 only in its consideration of the question of whether there was a substantial effect on competition resulting from the acquisition and not in its consideration of the question whether Koppers and Thomas Flexible Coupling Company were engaged in the same line of commerce.

4. Whether the District Court erred in finding that the acquisition of the Thomas Flexible Coupling Company by Koppers Company, Inc., had the probable effect of substantially lessening competition or tending to create a monopoly in a line of commerce within the meaning of § 7 of the Clayton Act, 15 U.S.C. § 18.

5. Whether the District Court erred in ordering divestiture of the Thomas Flexible Coupling Company by Koppers Company, Inc., without affording the defendants an opportunity to present alternate remedies to divestiture and in holding that the only remedy permitted by law was complete divestiture.

STATEMENT

On January 3, 1961, Koppers Company, Inc. (hereinafter called "Koppers") acquired the Thomas Flexible Coupling Company (hereinafter called "Thomas"). The appellant Thomas was a highly successful small business with annual sales in 1960 of $1,715,048 and profits in excess of $100,000 per year. Its sole product was a disc type flexible coupling sold under the name of the Thomas Flexible Coupling. Upon the death of Mr. Milward T. Thomas, the founder and controlling stockholder of Thomas, the executor of the Thomas estate was directed under the terms of Mr. Thomas' will to dispose of his stock in the company.

The appellant Koppers is a highly diversified company which manufactured and sold as one of its products a gear type flexible coupling. This coupling was sold under the name of the Fast Coupling. Koppers' sales of Fast Couplings in 1960 amounted to $6,739,721. This was approximately 23% of the total sales of all flexible couplings of all types by all companies in 1960 and was 2.2% of the total sales of all Koppers products in 1960. Prior to the acquisition Koppers produced no disc type flexible couplings and Thomas produced no gear type flexible couplings.

The evidence presented at trial revealed that flexible couplings are devices used for the general purposes of transmitting power by joining together rotating shafts and of compensating for some misalignment between the rotating shafts. However, the evidence further revealed that these couplings accomplish other objectives depending on the conditions present in the

application, the engineering limitations resulting from the type of coupling, and the requirements of the systems of which the coupling is a part. Substantial differences exist between the gear type flexible couplings produced by Koppers and the disc type flexible couplings produced by Thomas, and these differences result in different uses for the two types of couplings to meet these other objectives. The first and most obvious difference which the District Court noted is that disc type flexible couplings and gear type flexible couplings are physically quite dissimilar and function differently in achieving their flexibility (Appendix, *infra*, p. 29).

The defendants introduced through the Vice President of Thomas, a study of the 1960 sales of Thomas. This study was made by first determining the sales volumes in the various model lines of Thomas couplings. Next, the Thomas model lines were compared with the different gear type couplings made by Koppers. A judgment was then made as to whether there were any gear type coupling models which from an engineering standpoint could have been used interchangeably with any Thomas coupling models. The purpose of this study was to determine the percentage of sales of the Thomas disc type couplings which were possibly competitive with the gear type couplings sales of Koppers Company. It was found as a result of this study that only 8.19 per cent of the total sales made by Thomas in 1960 were in possible competition with the Koppers gear type couplings. While the District Court made no direct finding as to the amount of competition, this study was never seriously challenged and the District Court did employ the figures resulting from this study in its opinion (Appendix, *infra*,

p. 33). These figures are the only measure of the *quantity* of competition between gear and disc type couplings that is to be found in the findings of fact, the conclusions of law or the Court's opinion.

The undisputed evidence in this case indicated that the buying public recognized that disc type flexible couplings and gear type flexible couplings are different products. While the District Court found to the contrary (Appendix, *infra*, pp. 31-32) the undisputed and uncontradicted testimony both of the only government witness and of the three defense witnesses who testified about the purchasing of couplings, was that the purchasing of couplings is governed by engineering considerations.[1] The purchasing decision is thus controlled in this industry by trained engineers.

Despite this showing the District Court held that the Koppers gear type coupling and the Thomas disc type coupling competed within the same line of commerce for purposes of §7 of the Clayton Act. In view of the relative volumes of the sales of flexible couplings of both companies prior to the acquisition and the 8.19 per cent of possible competition between them the Court held

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1. In rejecting the evidence that the purchasing of flexible couplings is controlled by the engineering staffs of the purchasing companies, the Court relied on its impression that three "manufacturers' representatives" were not engineers and on the fact that on a number of installations the gear type couplings made by Koppers and the disc type couplings made by Thomas could be used interchangeably (Appendix, *infra*, p. 32). These points, even if true, hardly contradict the testimony concerning the nature of the purchasing procedure for couplings.

that the acquisition may have an adverse effect on competition or may tend to create a monopoly and therefore found it to be violative of §7 of the Clayton Act.

At the pretrial conference held on September 14, 1961, it was ordered that the trial be limited to the issue of whether or not a violation of the antitrust laws had occurred. The defendants at that time indicated that they would, in the event of an adverse finding, want to introduce evidence going to the issue of the proper remedy to be applied (Appendix, *infra*, p. 66).

Following the issuance of the opinion by the District Court the government filed its proposed decree calling for complete divestiture. The defendants filed their objections to this proposed decree and requested the opportunity to present alternate proposals to complete divestiture and to introduce evidence to support its arguments that such proposals would accomplish the objectives of §7 of the Clayton Act as effectively as complete divestiture (Appendix, *infra*, pp. 59-60). The District Court held however that divestiture was the only remedy envisioned by the Act and denied the defendants' request (Appendix, *infra*, pp. 67-69). Final judgment was entered on January 24, 1962.

THE QUESTIONS ARE SUBSTANTIAL.

Essentially this case raises two important problems. The first of these problems involves a determination of the line of commerce appropriate to a case like the present, and the second problem involves the right of a defendant in a civil antitrust action to a hearing and to introduce evidence on the question of the remedy. Each of these problems should be resolved by this Court.

On the line of commerce problem, the controlling facts are: (1) there is some competition between disc type and gear type flexible couplings, and (2) in 1960 the amount of that possible competition between the Thomas disc type and the Koppers gear type couplings was less than 10% of the Thomas sales for that year.

There is a line of cases arising under the pre-1950 version of §7 of the Clayton Act[2] beginning with *International Shoe v. F.T.C.*, 280 U.S. 291, which held that a small amount of overlapping sales between the acquiring and acquired firms would not invalidate a merger. The decision of this Court in *International Shoe* has been followed in a number of lower court opinions holding that small amounts of competition do not render a merger violative of §7 of the Clayton Act *United States v. Asso-*

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2. "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

ciated Press, 52 F. Supp. 362 (S.D. N.Y. 1942); *Trans-America Corp. v. Board of Governors*, 206 F. 2d 163 (3rd Cir. 1953); *V. Vivaudou Inc. v. F.T.C.*, 54 F. 2d 273 (2nd Cir. 1931) and *In re Pressed Steel Car Co. of New Jersey*, 16 F. Supp. 329 (W.D. Pa. 1936).

This problem of whether two firms whose products are not even potentially competitive in over 90 per cent of their total sales of those products can be considered as competing within the same line of commerce as to those products for purposes of amended §7 of the Clayton Act is unresolved. This is an important problem which in the light of present business trends ought to be resolved.[3]

The second substantial problem raised in the appeal involves the right of a defendant in a civil antitrust case to a hearing and presentation of evidence on the issue of the appropriate remedy. This Court expressly rejected the proposition that divestiture was a mandatory remedy in a case arising under §7 of the Clayton Act. *United States v. E. I. DuPont*, 366 U.S. 316, 328. However, the District Court in the present case did now allow the time requested by the defendants for the preparation and presentation of evidence and arguments bearing on possible alternative remedies to divestiture, because the Court erroneously concluded that it had no alternative to ordering divestiture. The defendants make no claim

3. The importance of this question can be seen by examining two facts. First, the number of mergers and acquisitions is continuing to grow. 18 Conference Board Business Record 50 (September, 1961). Second, the present merger movement is characterized by a trend toward diversification. 116 Financial World 6 (October 4, 1961).

that the District Court acted arbitrarily in denying the defendants a hearing, but rather that this denial of a hearing resulted from the Court's misinterpretation of the law.

This action of the District Court appears to be in direct conflict with the principles enunciated by this Court in the second *DuPont General Motors* decision. On the authority of that case, the defendants were entitled to their day in Court to present to the Court and to have the Court consider evidence and arguments on alternative remedies short of divestiture which would effectuate the purposes of the Act in the light of the case before the Court. The defendants recognize that this is not a light burden. However, in cases like the present where large sums of money and important property interests are involved and where, in view of the minimal pre-acquisition competition, feasible alternatives to complete divestiture may exist, the defendants have a right to present evidence and to be heard on the merits of this question.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

Opinion

WILLSON, J.

The complaint in this case was filed by the United States on February 17, 1961. On January 3, 1961, Koppers Company, Inc., acquired the controlling stock interest in Thomas Flexible Coupling Company. The complaint alleges that the acquisition is in violation of Section 7 of the Clayton Act, 15 U.S.C., Section 18. The preparation and trial of the case has proceeded with dispatch. Counsel for the parties were quick to get to the basic issues through discovery and pretrial, with the result that the case came on for trial at the October, 1961, Non-Jury term at Erie. Briefs have been filed and considered and counsel have been heard at oral argument.

Upon consideration of all the evidence and the law, this court has come to the conclusion that the merger is in violation of Section 7 of the statute and must be set aside.

The issues in the case concern the flexible coupling industry of the country. There is no dispute as to the definition of a flexible coupling. It is a device which is used to connect rotating shafts, transmit the power from the driving to the driven member, and while so doing, compensate for minor degrees of misalignment. There are various types of flexible couplings such as gear, disc, grid, rubber jaw and chain, each of which serves the function of connecting rotating shafts, transmitting

power from the driving to the driven member, and while so doing, compensating for minor degrees of misalignment, although each may use a different principle to achieve its flexibility.

The defendant, Koppers Company, Inc., hereinafter referred to as Koppers, is a corporation organized and existing under the laws of the State of Delaware with its principal office in Pittsburgh, Pa. Koppers is a highly diversified organization with total sales in 1960 in excess of $300 million. It conducts its business through eight operating divisions, one of which is its Metal Products Division. The Metal Products Division is in turn segmented into various departments, one of which is the Coupling Department which manufactures and sells flexible couplings from its plant in Baltimore, Maryland. These couplings are sold and shipped throughout the United States in interstate commerce.

Thomas Flexible Coupling Company, hereinafter referred to as Thomas, is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office in Warren, Pennsylvania, in this district. Thomas flexible couplings are manufactured in Warren and are sold and shipped throughout the United States in interstate commerce.

In speaking of what each of the defendants manufactures and sells, the court, of course, is referring to that period prior to the merger. Thomas manufactures and sells a disc type flexible coupling. Koppers manufactures and sells a gear type flexible coupling which, as it says in its catalogue, is—

> "Based on Gustave Fast's famous patented principle, FAST'S couplings automatically compensate for angular, offset, and angular-offset misalignment."

The formula used by all flexible coupling manufacturers including Koppers and Thomas to determine the size of the coupling to be used is:

$$\frac{H\ P}{R\ P\ M} \times 100 \times \text{Service Factor} = \text{load requirement}$$

Because the functions of flexible couplings are difficult to accurately portray, the following proposed finding, as submitted by the defendants, is quoted as the government has agreed that it is an accurate statement;

> "Metal flexible couplings manufactured and sold by both Koppers and Thomas are used for the general purpose of transmitting power by joining together rotating shafts. They serve three functions: (1) Couple shafts for mechanical power transmission, transferring the torque of one shaft to the other, directly and with constant velocity. (2) Compensate for all types of misalignment between shafts without inducing stresses and loads on the connected equipment and without a tangible loss of power. (3) Compensate for end or axial movement of the coupled shafts, preventing either shaft from exerting a thrust on the other and allowing each to rotate on its normal axial position."

The principal sales of flexible couplings are made to large commercial users of machinery and original equipment manufacturers. Sales are made by means of salaried sales personnel, by distributors, or by sales representatives operating on commission. Total sales of all types of flexible couplings for each of the years 1958, 1959 and 1960 were as follows: (rounded figures)

1958	$23,500,000
1959	28,200,000
1960	29,400,000

As antitrust cases go, the issues in this case are not complicated. The government contends first that flexible couplings are a line of commerce within the meaning of amended Section 7 of the Clayton Act under the evidence in this case. It is well to emphasize that this is solely a case brought under Section 7 of the Clayton Act as amended in 1950. The pertinent part of that section reads:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

In deciding cases under this section, the courts have in all instances, carefully studied the legislative history of the Clayton Act. The history of this section was cited to this court and is set forth in the brief, and the court has reviewed the Committee Reports.

United States v. Du Pont & Co., 353 U.S. 586 (1957), is the landmark case. But it is to be noted however, that the Du Pont case was brought and decided under Section 7 as it existed prior to the 1950 amendment. Recent District Court decisions under the 1950 amendment are *United States v. Bethlehem Steel Corporation*, 168 F. Supp. (S.D.N.Y., 1958); *United States v. Brown Shoe Company*, 179 F. Supp. 721 (E.D. Mo., 1959). It is believed that Judge Weinfeld in the Bethlehem Steel case,

commencing at p. 581, has carefully and correctly summarized the legislative history of the Clayton Act and the circumstances which led to the 1950 amendment of Section 7. He cites the Committee Reports and authoritative decisions. He says:

"It is stating a fact of history to say that Congress felt that the Sherman Act passed in 1890 had proved quite ineffective in halting the growth of 'trusts' and monopolies. High consolidations and mergers continued to be effected through the purchase of stock and 'trusts' continued to flourish. The evils of corporate mergers and combines with their increasing concentration of power commended the concerned attention of the nation. The 'rule of reason' enunciated by the Supreme Court in 1911 in Standard Oil Co. v. United States, regarded by many as having weakened the Sherman Act, gave impetus to efforts to secure more effective means of preserving our free enterprise system. Political agitation for curbing the growing power of 'trusts' and the concentration of economic power followed the Supreme Court ruling. In the national campaign of 1912 all major political parties denounced the monopolistic trends and their platforms carried planks for remedial ligislation. The leadership in the efforts to strengthen the antitrust laws was assumed by Woodrow Wilson, who thereafter in a series of messages to Congress urged further legislative action. The Congress acted in 1914 by passing the Clayton Act. Its essential purpose was preventative —to check anticompetitive acts in their incipiency before they reached the dimensions of Sherman Act violations. In short, Congress contemplated a stand-

ard much less rigorous than that which had become required under the Sherman Act. As stated in the Senate Report on the bill:

> 'Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves are not covered by (the Sherman Act), or other existing anti-trust acts, and thus, by making these practices illegal to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.'

This has been expressly recognized by the Supreme Court.

Despite the clear purpose of the original section 7 of the Clayton Act, its objectives were not fully realized. This frustration was generally attributed to a number of factors. First, the statute applied only to acquisitions of stock and did not apply to acquisitions of assets, and even as to stock acquisitions it was interpreted so as not to apply where the stock was used to acquire assets. Second, it was generally assumed that original section 7 did not apply to vertical mergers. The inadequacies of the section, whatever the reasons, were further highlighted by pronounced post war merger activity which resulted in the elimination by large corporations of independent companies in industries which had traditionally been considered small business fields. Congress showed increasing concern with the sharp rise in economic concentration and with the prospect of even greater concentration in the light

of the continuing merger trend. Further, the Columbia Steel case brought home the limitations of the Sherman Act in merger cases. It was against this background that Congress amended section 7.

The 1950 amendment to section 7 expanded its sweep so as: (1) to prohibit the acquisition of assets as well as stock, (2) to broaden the area in which competition may be adversely affected by eliminating the test of whether the effect of the acquisition *may be substantially to lessen competition* between the acquiring and the acquired corporation; (3) to eliminate the prior test of whether the acquisition might restrain commerce 'in any . . . community' and instead, to make the test whether 'in any line of commerce in any section of the country' the acquisition may substantially lessen competition, or tend to create a monopoly; and (4) to cover vertical as well as horizontal mergers.

The Congressional reports illuminate the reasons which led to the amendment of section 7. A fair reading of both the Senate and House Committee Reports leaves no doubt as to its major objectives. As stated in those Reports they were, in some instances in haec verba, (1) to limit future increases in the level of emonomic concentration resulting from corporate mergers and acquisitions; (2) to meet the threat posed by the merger movement to small business fields and thereby aid in preserving small business as an important competitive factor in the American economy; (2) to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions; and

(4) to avoid a Sherman Act test in deciding the effects of a merger."

This court accepts the legislative history as found in Judge Weinfeld's opinion, and incorporates it as a part of this decision.

I. *Discussion of the issues.*

It is safe to say at the outset that in this case the main area of dispute between the parties is whether there has been competition between Koppers and Thomas in the production and sale of their metal flexible couplings. John M. Crimmins, Esq., chief counsel for the defendants was frank to say at the oral argument that in determining the line of commerce the court must find its decision" * * * based on the actualities of the market place. * * * That's competition. Actual competition. Actual competition in sales at the time of the acquisition." He stated further, "if these companies worked in substantial competition at the time of the purchase, then our case fails. The turning point is the amount of competition between Koppers and Thomas at the time that we acquired Thomas." Contrary to the government's contention that the line of commerce is flexible couplings, defendants contend that the Flexible coupling industry must be subdivided into several lines of commerce. They say that Thomas, the sole manufacturer of metal disc couplings, is engaged in one line of commerce; that Koppers, in the manufacture and sale of its gear type flexible couplings is in another and separate line of commerce.

It is the government's position that the merger in this case is a horizontal acquisition. It refers to the House Report in which the three types of acquisition

are defined. Horizontal acquisitions are those in which the firms involved are engaged in roughly similar lines of endeavor; vertical acquisitions are those in which the purchase represents a movement either backward from or forward toward the ultimate consumer; and conglomerate acquisitions are those in which there is no discernible relationship in the nature of business between the acquiring and acquired firms. The defendants contend that the Thomas acquisition by Koppers is a conglomerate merger. However, all the evidence indicates that the two corporations have been engaged in roughly similar lines of endeavor. Both the Koppers and the Thomas coupling seek to accomplish the same result, that is the accommodation of misalignment. The grid, rubber jaw and chain type flexible coupling serves the same function of connecting rotating shafts and seek the same result, although each may use a different principle to achieve its flexibility. On the evidence, this court believes there can be but one finding and that is that the flexible coupling industry is recognized as having sufficient peculiar characteristics and uses to constitute flexible couplings as products sufficiently distinct from all other products as to make them a line of commerce within the meaning of the Clayton Act. But says the defendant, this still does not control the issues in this case, because as in Bethlemen Steel, the court found the Steel industry to be a line of commerce but said certain subdivisions thereof are separate lines of commerce. I do not understand that defendants' quarrel with the government's contention that the flexible coupling industry is a line of commerce, provided that the court consider it in a broad sense, as did the court in speaking of the steel industry in the Bethlehem Steel case. But,

as indicated, defendants contend that because there was actual competition in the market place between Kopper's coupling and the Thomas coupling, each must be found under the evidence to be a separate line of commerce and therefore no violation of the statute has resulted from the merger.

In the Du Pont case, Justice Brennan, at p. 593, said that the "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected."

II. *The evidence in this case shows that flexible couplings have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other products as to make them a line of commerce within the meaning of the Clayton Act.*

All flexible couplings are not identical and most of them have quality and use differences. Yet this court finds that under the decisions and the evidence they are still sufficiently distinct from other products as to constitute them a line of commerce. There is no disagreement whatsoever by any of the witnesses as to the function and purpose of the flexible coupling. The government introduced into evidence exhibit G-91, an article from the Engineer's Digest. As indicated, the article is headed "Flexible Couplings". The article lists the specific properties of flexible couplings as compared with a rigid arrangement, e.g., bolted, keyed, press

fitted or shrunk on connections, which can be employed without too much difficulty on comparatively short lengths of shafts running in bearings with brackets or pedestals on a common bedplate. But, says the Digest, with flexible couplings a certain amount of misalignment is permissible because the force due to angular, radial or axial errors are either made inoperative by joints, links, pivoting or sliding action or give rise to strains which are associated with low stresses to the members of the coupling. A shorter definition of a flexible coupling can be gathered from the Engineers' Digest as an "Accommodation of Misalignment". The Digest states that it is an important point that any misalignment be absorbed by the coupling themselves, i.e., that no end thrust, side thrust, additional axial or bending vibrations, torsional vibrations, edge loads, or rubbing action be imposed on the shaft. Further, the Engineers' Digest classifies and described flexible couplings in two basic groups. One is couplings incorporating nonmetalic components and the other is all metal couplings. Under the latter are metal disc couplings, metal spring couplings, metal brush or pin couplings, gear couplings and chain couplings. It should be noticed that under the second group, Thomas makes the metal disc coupling and Koppers the gear coupling. It is to be emphasized that the whole field of flexible couplings is encompassed in an article from the Engineers' Digest entitled "Flexible Couplings".

The evidence by the witnesses in the industry shows that the gear, disc, rubber, jaw and chain type flexible couplings are all regarded as products of a general classification, that is flexible couplings. For instance, Mr. Gibson, Purchasing Agent for the Worthington

Pump Co. was called as a witness by the defendants and said (Tr. 344)

> ". . . we code all of our purchases. . . . Couplings are so specified as couplings, and then we also break that down further as to the manufacturer or the type of coupling."

This witness regarded flexible couplings in the broad category of couplings. The item he buys in the first instance is regarded as a flexible coupling. It is safe to say from this witness's testimony that to him and his company flexible couplings have sufficient individual peculiarities as to be isolated or separated under one heading, "Couplings". Thus, under the evidence in this case, it seems to this court that the manufacture and sale of all flexible couplings in the United States is a line of commerce. But the finding that a flexible coupling industry is a distinct line of commerce standing alone is insufficient in which to find a violation of the statute.

As indicated in the Du Pont case, there must be a determination of the relevant market to predicate a finding of a violation, because the threatened monopoly must be one which will substantially lessen competition within the area of affected competition. Substantiality can be determined only in the terms of the market affected. The market in this case is the market for flexible couplings throughout the United States. It is stipulated that the section of the country is the whole United States as both corporations do business in interstate commerce and sell nationwide. Thus we are down to the basic issue as contended by the defendants, that is, that there is and has been no substantial com-

petition between Koppers and Thomas in the sale of their couplings, and that therefore the acquisition is lawful.

At this point in the discussion it is believed that a word of explanation as to the method of decision is in order. At the conclusion of the trial of this case, as trial Judge, I had a strong impression that the government had shown by a preponderance of the evidence that the merger was in violation of Section 7. During the trial the government put into evidence some 99 exhibits and offered the testimony of 6 witnesses. The defendants introduced 20 exhibits and put 8 witnesses on the stand. As the exhibits were introduced, they were examined and considered in relation to the purpose for which they were offered. Likewise, the oral testimony was considered in relation to the issues in the case. Because of pretrial conferences, this court believes that it was fairly conversant with the issues during the trial. As indicated, I have now decided that the government is to prevail. The decision, however, was not made until after oral argument and a study of the final briefs. Counsel on both sides have been most careful and exceedingly helpful in the preparation of briefs and especially in the proposed findings which each requests the court to make. But as the case is to be decided in favor of the government, it necessarily follows that the government's proposed findings are the ones which the court accepts. This is not because it is a convenient method of deciding a case but because this court is convinced that the findings submitted by the government are based upon credible persuasive evidence of almost overwhelming probative value. It necessarily follows, of course that the proposed findings

submitted by defendants are rejected. It is to be noticed, however, that proposed finding 11, as submitted by defendants, has been agreed to and will be substituted and will stand in lieu of the government's proposed finding 6.

In the remaining discussion of the issues and the evidence, I have not attempted to refer to all the exhibits nor to quote or refer to everything said by all the witnesses. References, however, will be made to some of the exhibits and to some of the testimony, which in the mind of the court is persuasive.

It is appropriate to point to the government's evidence which in the opinion of this court compels the finding that the government has proved by a fair preponderance of the evidence, a violation of the statute.

III *The market affected is substantial.*

In 1960 the sales of all types of flexible couplings amounted to nearly $29,400,000. In that year Koppers sold flexible couplings in the amount of $6,739,721. Thomas sold flexible couplings in the amount of $1,715,048. Koppers' sales of flexible couplings in 1960 alone amounted to 23% of the total. Thomas' sales in 1960 amounted to 5.8% of the total. The combined Koppers-Thomas sales amounted to $8,454,769, which was 28.8% of the total sales in flexible couplings in 1960. In the detailed findings of fact which appear, infra, the figures for 1958 and 1959 are comparable. It is understood also that as to the market and the substantiality, defendants raise no issue.

Thomas has been a profitable company averaging profits in excess of $100,000 per year during the period

of 1955 through 1959. Koppers is one of the five largest manufacturing companies in the United States with sales in excess of $300,000,000. Koppers is the largest manufacturer of flexible couplings in the United States but Thomas is the largest exclusive manufacturer of flexible couplings in the country, as it is the largest firm in the United States manufacturing only flexible couplings. Thomas is highly regarded in the industry and has a well established market. The history of this company is not unlike the history of many other of the smaller business establishments in the country. The business was founded by Millward T. Thomas, now deceased, who owned and operated it successfully for many years. On the death of Mr. Thomas, his successors in ownership were agreeable to a sale, and the transaction with Koppers was completed in early 1961. There is no controversy between these parties but that the relevant market for the purpose of this case is coextensive with the flexible coupling market in the United States, which in turn is nationwide. It is believed also that there is no serious controversy but that each of the defendants prior to the merger had a substantial part of that market. The chart at p. 27 of exhibit G-90 illustrates this fact. The Koppers and Thomas combined sales come to 28.8% of the total in the country. The next 18 companies had 65.7% of the sales, leaving 41 companies with 5.5% of the sales, equaling $1,630,875.

IV. *Prior to the merger, there was substantial competition between Koppers and Thomas.*

The foregoing is a statement of the crux of the case. The government has pointed its proof in support of that proposition. The defendants have attempted to show that the statement is incorrect. The court has not overlooked what was emphasized in both the Bethlehem Steel and the Brown Shoe case as to the effect of the 1950 amendment of the act. The act previously required a substantial lessening of competition between the acquiring and the acquired corporations and narrowed the restraint to any section or community. However, it now prohibits (a) any acquisition of stock or assets (b) in any line of commerce (c) in any section of the country (d) where the effect may be substantially to lessen competition or tend to create a monopoly.

No doubt, in many of the anti-merger cases found in the books, the issue of competition between the acquiring and acquired corporations has not been so decisive as it is in this case. But this court is deciding the issues presented in this case only. Here the extent of the competition between Koppers and Thomas determines the decision because it follows that if that competition was substantial than the merger has lessened competition in a line of commerce throughout the United States.

The court agrees with defendant's statement that the decision as to whether the couplings compete in the same or different lines of commerce involves both legal and factual questions. This court has not overlooked defendants' contention that the various tests evolved by the courts look to (1) the physical and functional characteristics of the products, (2) the existence of price

competition between the products, (3) the degree of interchangeability existing between the products and (4) the attitude and actions of the buying public.

Mr. Crimmins, for the defendants, points to the undoubted fact that the physical characteristics of the Koppers and Thomas couplings are not the same but different. It is true that the witnesses recognized that these couplings are physically distinguishable one from the other. This fact becomes apparent from a mere glance at the catalogues as well as at the couplings themselves which were offered into evidence. There is no dispute also that the two couplings function differently in achieving their flexibility. The gear type coupling permits flexibility by virtue of the clearance between the gear teeth on the hub and sleeve of the coupling. The disc type coupling achieves its flexibility through the bending of the metal discs which are an integral part of the coupling. Defendants say that the differences between the two couplings are important since it is a result of these differences that the two types of couplings do not compete for the same consumer dollar.

Under (2) defendants declare that there is no actual price competition between the two products, and assert that the government has failed to adduce any evidence indicating that a change in the price of one type of coupling results in an increase or decrease in the sales of the other type of coupling. Defendants point to the testimony of Mr. Zurn on this point. This witness markets a gear type coupling which, he claims, is in competition with both the Koppers and Thomas couplings. He indicated in his testimony that it was only in very small sizes where the volume is high that price becomes

important. It is true also that three of defendants witnesses testified that the purchasing of the couplings was governed largely by engineering requirements. The conclusion which the defendants draw is that there is no sensitivity to price change in the purchasing of the two types of couplings, and that therefore there is no cross elasticity of demand with relation to the market of the two products.

Defendants next (3) assert that the two couplings are functionally not interchangeable. This was an important point in *United States v. E. I. Du Pont*, 351 U.S. 377 (1956) (the cellophane case). This principal of lack of interchangeability is strongly emphasized by defendants as controlling on the issues of competition between Koppers and Thomas prior to the merger. In the language of the cellophane case, say the defendants, this court must decide whether the Fast gear type coupling and the Thomas disc type coupling are, ". . . reasonably interchangeable by consumers for the same purposes." It is conceded that the Thomas disc type coupling requires no lubrication and the Koppers gear type coupling does require lubrication. As a result, unquestionably there are applications where non-lubrication is a necessity and the Koppers coupling cannot be used. At p. 12 of the Thomas catalogue, exhibit G-92, a non-lubricating coupling is shown on two installations, the first being on a turbine and the second being on a centrifugal pump. It is conceded that in areas where high levels of oxygen are present couplings must be of the disc type because of the humidity conditions at all times. Defendants contend also on this issue that the Thomas coupling is free of backlash whereas the Fast coupling has backlash. However, the evidence seems to the court

to be inconclusive on this subject except that in some areas particularly those mentioned by Mr. Cammen of the Ingersoll-Rand Company, the Thomas coupling is preferable in applications involving reciprocating equipment. Much testimony also was introduced on the issue of vibration in the various types of couplings on the market as well as the speed of the rotating shaft as requiring one or the other coupling, and whether Thomas had most of the market in sales to diesel engine manufacturers. As to the latter, defendant contends that Thomas sales to diesel manufacturers represents a substantial share of its business but the court notices that in 1960 the total came to $119,626.00 out of a gross total of $1,715,048, which is not too persuasive on the issue of substantiality.

Under (4), that is the test being as to the attitude and actions of the buying public, defendants contend that whether products belong in the same or relevant markets is whether or not the industry itself recognizes the products involved as being different products or the same product. See *United States v. Brown Shoe Company*, supra. It is, of course, correct to say at the outset on this proposition that the discussion is to be confined to the flexible coupling industry and its specialized buyers, mostly original equipment manufacturers.

Defendants' contention in this respect boils down to the proposition that the buyers choice as to the coupling he uses is made by a trained engineer. Presumably such an engineer is only guided by the engineering requirements of an installation scientifically reviewed and uninfluenced by any other factors. If that principle is accepted as an established fact by the evidence in this case,

then the government's case fails, but the court believes that the evidence shows that the engineers' choice is but one element to be considered by the buyers in purchasing one or the other of the number of couplings on the market. For instance, government witnesses, Zurn, Ricketts and Miller, represent the manufacturers of couplings which they contend compete with both Koppers and Thomas. They sold to many of the same customers. They were not engineers. Witnesses testified that in many installations, either a Fast coupling, Thomas or some other coupling could do the job required. For instance, Mr. Gibson, the Worthington representative (Tr. 346) in speaking of a high starting torque indicated that both the gear type coupling and the disc type coupling were satisfactory. On many rotating shafts both a Fast and a Thomas coupling were used, one on one end and one on the other.

As to the defendants' contentions just reviewed, (1), (2), (3) and (4), the government answers in its reply brief by calling attention to the fact that many of the propositions as stated were tests evolved under, and applicable to, Sherman Act cases. Moreover, this court observes that the tests mentioned are product tests only. It does not appear that the various tests which defendants claim are controlling have application to the facts in the instant case. If it is felt, however, that they do have a substantial bearing upon the issues in this case, then the evidence shows that (2), (3) and (4) as stated by defendants, do not detract from the government's contentions but in fact support them.

As to the competition between the couplings, this court believes that the evidence in this case is practically

conclusive that it is only in the sizes under 1¼" in diameter and in areas where no lubrication is required that the Fast and Thomas couplings do not compete. But the evidence shows that the bulk of Thomas sales is in the other sizes where competition exists. Also, it is shown that there is practically no installation of a gear type coupling where a Thomas coupling will not do the job. As a general proposition defendants contend that the testimony of the government witnesses has about the same probative value as does the documentary evidence which they rely upon. Defendants assert that the government's witnesses advanced merely opinions as to the amount of competition between gear type and disc type couplings. Defendants claim that not one of the government witnesses made any factual study of the amount of real competition between these couplings. Stress is laid by defendants on the fact that not one of the government witnesses knew what Thomas' 1960 sales were, and that, says defendants, without knowing what the sales figures were, these witnesses were in no position to evaluate the amount of Thomas' sales that were in actual competition with them, that is Thomas competitors.

Defendants relied to a great extent upon the testimony of Mr. G. W. Werner, Vice President of Thomas, who had made a detailed analysis of the 1960 sales of the Thomas Company, and came to the conclusion that 82.17% of Thomas' totals were non-competitive with the Fast coupling sales. Defendants conceded that 8.19% of the total of Thomas sales in 1960 were in competition with the Koppers coupling. But taking defendants' percentages as testified to by Mr. Werner, it seems that 8.0% to 9.0% is a substantial figure in discussing the issue of the lessening of competition.

This brings the discussion to a point where it is important to consider what congress meant when it used the word competition in the statute, especially, that is where section 7 says, ". . . the effect of such acquisition may be substantially to lessen competition." Judge Weinfeld in the Bethlehem Steel Case points out (p. 588) that the House Committee Report states section 7 is intended to apply when the effect of an acquisition may be a significant reduction in the *vigor of competition.* He say also that the section 7 market may not necessarily be the same as the economist's concept of market. He says that the "line of commerce" signifies a product market and "section of the country" refers to a geographical market. Judge Weinfeld says further, a horizontal merger can effect the competition in at least two ways. It can have an impact not only on the competitors of the merged companies but also on the buyers who must rely upon the merged companies and their competitors as sources of supply. He says further, (p. 592),

> "Competition is not just rivalry among sellers, It is rivalry from the custom of buyers."

What Judge Weinfeld has said concerning competition and its meaning in a Section 7 case is illustrative of the broad inclusiveness with which it is believed the word was used by Congress in this statute. The defendants would confine it to a statistical analysis of the market place only. That is shown by Mr. Crimmins' language, ". . . by the actualities of the market place." The word competition is using language" . . . so clear and unambiguous as to leave no room for construction." (Judge Maris in *Transamerica Corp. v.*

Board of Governors, 206 F.2d 163 (3 Cir., 1953).) But nevertheless, it is believed that one is privileged to look to a dictionary for the ordinary and usual definition. Webster's Dictionary says it is:

> ". . . the act of competiting, especially of seeking or endeavoring to gain what another is endeavoring to gain at the same time; common strife for the same object; strife for superiroity."

Under a synonym it is stated in Webster,

> "Competition implies a struggle or contest between two or more persons for the same object."

Webster refers to the adage, "Competition is the life of trade."

It seems to this court that the latter phrase is a cogent expression of the will of congress as shown by the Legislative History. Competition is to be kept alive. It is used in the statute in a broad and inclusive sense. It embraces the everyday strife and struggle between and among competitors for business. Competition has been the driving force in producing our tremendous economic strength. It is industry's great challenge—a challenge to develope new processes, new inventions, managerial techniques and new ways to increase the productivity of labor. The record made by management of both Koppers and Thomas people before the merger showed that they considered themselves competing with one another and with the other manufacturers of flexible couplings. The government exhibits illustrate words and actions of Koppers and Thomas people prior to the time the law suit was brought. Exhibits G-9 through G-42, G-44 through

G-46, G-50 through G-56, G-58 through G-64 and G-80 through G-83, which came from the Koppers records refer to Thomas as a competing company or to the Thomas coupling as a coupling competing with the Fast coupling. Exhibits G-47, G-48, G-56, G-57 and G-65, from the Thomas files indicate that Thomas regards Koppers as being competitive. Especially to be noticed is exhibit G-65 written October 21, 1960, by Mr. G. C. Werner, the executive head of Thomas. He is writing to a manufacturer. He says:

> "We cannot recall a single government agency or large commercial agency which has refused to accept gear type and Thomas couplings as basically equal. It is freely admitted that there are biased customers who will write us out of their request for bids. We add just as quickly that there are customers who write out the gear type coupling by simply stating 'all metal non-lubricated' to exclude the gear type."

That letter comes from the highest authority in the Thomas Flexible Coupling Company at the time it was written. He is the witness on whom the defendants rely as showing lack of competition between the two companies.

A letter from the Koppers file, exhibit G-1, was written by T. W. Chase, head of Koppers Coupling Department at Baltimore, to the Koppers Sales Manager. The writer suggests opening negotiations with Thomas for the purchase of the Thomas Flexible Coupling Company. He points out that Koppers' Los Angeles agent cited four sizable customers, all of whom were familiar

with the Fast coupling but were now specifying the Thomas units. He says:

> "Southern California Edison and Tidewater Oil Company were two of these. The General Purchasing agent of Ingersoll-Rant told me personally that more and more people are specifying Thomas couplings and that we are being hurt on our position with them."

The letter points out that Mr. Millward T. Thomas, the President of his company,

> ". . . . has practically singlehandedly created a market better than 25% as good as we have done and with many of his items at price levels in excess of ours."

He further says,

> *"I shudder to think what the result will be if one of our competitors or any other organization with foresight and a capable sales team could do in the industry if they owned the Thomas Company."* (Emphasis supplied)

One can infer what caused Mr. Chase to shudder when he thought about the Thomas Flexible Coupling Company. He recognized the competition of Thomas. He was worried as to what energetic management in Thomas might accomplish. He did not intend to let a competitor acquire Thomas.

Government Exhibit G-90 is designated as plaintiff's chart book. Ordinarily this court examines such an exhibit with considerable reluctance. Charts and statistics have but little life and credibility as a general proposi-

tion. Nevertheless, exhibit G-90, in this court's opinion is revealing and persuasive as evidence in support of the government's contentions in this case. For instance, commencing at page 31 and running through 37, inclusive, are a list of some 195 common customers during 1958, 1959 and 1960 of Thomas and of Koppers showing the net dollar sales for those three years. The chart on page 30 illustrates the value of the common customer sales in thousands of dollars. In 1958, 77.0% of the Thomas sales were to customers who bought both Koppers and Thomas couplings. In that same year 44.0% of Koppers sales were to common customers. In 1959 Thomas had 69.0% and Koppers 38.0% of the sales to the same customers. In 1960 Thomas sales to common customers was 73.0% and Koppers sales to common customers was 48.0% of its total. It is in the evidence that the coupling sizes commenced at ¼" in diameter and ran in some instances as high as 28", but it is not disputed that the main bulk of the flexible coupling business is in diameter sizes between ¼" and 8". Some sales are smaller and some larger. Pages 42 and 43 of exhibit G-90 show an analysis of coupling sales of Koppers and Thomas in the various sizes. Unquestionably in the smaller sizes up to ¾" Thomas had practically the field to itself. Yet the 1" through 7½" in diameter couplings accounts for the bulk of each of the defendants' business. As exhibit G-39 shows, in the sizes 1½" to 7"' Koppers had 82.6% of its sales and Thomas had 84.9% of its sales. In the same sizes on a unit basis, 94.9% of Koppers is in the 1½" to 7" sizes and 64.6% of Thomas sales are in the same sizes.

Thus it appears conclusive that the substantial portion of the business of both Koppers and Thomas was

not only to the same common customers but in the same size couplings, and that in a substantial market area one coupling will do the same job as the other will do.

V. *The effect of Koppers' acquisition of the Thomas stock is to substantially lessen competition in the sale of flexible couplings throughout the United States.*

This proposition seems to be self evident from what has been said and what is shown with more particularity in the detailed findings of fact. Koppers has increased its percentage of the market from 23.0% to 28.8%. Thomas has been eliminated as a substantial competitor and the competition heretofore existing between them has been destroyed. Unquestionably, the ability of smaller manufacturers to compete with the combined Koppers-Thomas Company has been substantially lessened. Koppers' already dominant position in the industry has been enhanced by obtaining Thomas customer lists which competitors do not have. The $300,000,000 resources of Koppers permit more money for research and development and Koppers can utilize its own personnel in its sales force with comparatively little added expense and with major savings in commissions, all to the detriment of competing manufacturers. The government's last exhibit, that is G-99, illustrates one dominant advantage Koppers now has over its competitors in the marketing of flexible couplings. This exhibit is Koppers own advertisement put out after the merger. After mentioning the three couplings that Thomas now produces, this advertisement emphasizes that:

"Of considerable importance are the experienced extensive engineering and manufacturing services of

the entire Koppers organization that are available to help you with your power transmission problems . . . in any size, in any quantity, for any use."

It thus appears that one effect of this acquisition, as feared by some of the smaller competitors, has been realized. That is that the entire engineering and manufacturing services of the Koppers organization is now available in the industry for not only the Fast coupling but to promote the Thomas coupling as well. Such a result inevitably will squeeze the smaller manufacturers. The total effect of the merger will certainly tend to lessen competition in the coupling industry.

In this case the government has had the burden of proof and has met it with convincing and persuasive evidence. By a clear preponderance of the evidence the government has shown that the acquisition was in violation of Section 7 of the Clayton Act.

The findings of fact and conclusions of law which follow are part of this adjudication and an appropriate order will be entered on notice to counsel and submission by the government.

FINDINGS OF FACT

I Preliminary Jurisdiction

1. Defendant, Koppers Company, Inc., hereinafter referred to as "Koppers", is a corporation organized and existing under the laws of the State of Delaware, with its principal office in Pittsburgh, Pennsylvania.

2. Koppers is a highly diversified organization with total sales in 1960 in excess of $300 million. It conducts its business through eight operating divisions, one of which is its Metal Products Division. The Metal Products Division is in turn segmented into various departments one of which is the Coupling Department which manufacturers and sells flexible couplings from its plant in Baltimore, Maryland. These couplings are sold and shipped throughout the United States in interstate commerce.

3. Thomas Flexible Coupling Company, hereinafter referred to as "Thomas", is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office in Warren, Pennsylvania.

4. Thomas flexible couplings are manufactured in Warren, Pennsylvania and are sold and shipped throughout the United States in interstate commerce.

5. On February 17, 1961 the Justice Department filed suit against Koppers and Thomas charging a violation of Section 7 of the Clayton Act as a result of the acquisition by Koppers of substantially all the stock of Thomas. The acquisition was accomplished on January 3, 1961 by means of a stock exchange, with 1 2/3d shares of Koppers' stock exchanged for each share of Thomas stock.

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II Nature of the industry.

6. Metal flexible couplings manufactured and sold by both Koppers and Thomas are used for the general purposes of transmitting power by joining together rotation shafts. They serve three functions: (1) Couple shafts for mechanical power transmission, transferring the torque of one shaft to the other, directly and with constant velocity. (2) Compensate for all types of misalignment between shafts without inducing stresses and loads on the connected equipment and without a tangible loss of power. (3) Compensate for end or axial movement of the coupled shafts, preventing either shaft from exerting a thrust on the other and allowing each to rotate on its normal axial position.

7. There are various types of flexible couplings such as gear, disc, grid, rubber, jaw and chain each of which serves the function of connecting rotating shafts, transmitting power from the driving to the driven member and while so doing compensating for minor degrees of misalignment although each may use a different principle to achieve its flexibility.

8. Koppers manufactures and sells gear type flexible couplings under its trade name of "Fast's" which is used to connect rotating shafts, transmit power from the driving to the driven member and while so doing compensate for minor degress of misalignment.

9. Thomas manufactures and sells a disc type flexible couplings which is used to connect rotating shafts, transmit power from the driving to the driven member and while so doing compensates for minor degrees of misalignment.

10. The formula used by all flexible coupling manufacturers including Koppers and Thomas to determine the size of the coupling to be used is:

$$\frac{M\ P}{R\ P\ M} \times 100 \times \text{Service Factor} = \text{load requirement}$$

11. Among the principal firms manufacturing and selling flexible couplings are:

Koppers Company, Inc.
Thomas Flexible Coupling Company
Zurn Industries, Inc.
Poole Foundry and Machine Company
Sier Bath Gear & Pump Company
The Falk Corporation
Waldron Hartig Division of Midland Ross Corp.
Dodge Manufacturing Corporation
Lovejoy Flexible Coupling Company, Inc.
Ajax Flexible Coupling Company
Philadelphia Gear Corporation
Link Belt Company

12. The principal sales of flexible couplings are made to large commercial users of machinery and original equipment manufacturers. Sales are made by means of salaried sales personnel, by distributors, or by sales representatives operating on commission.

13. Total sales of all types of flexible couplings for each of the years 1958, 1959 and 1960 were as follows (rounded figures):

1958	$23,500,000
1959	28,200,000
1960	29,400,000

III Relevant Market

14. The following firms are considered by Koppers to be companies competitive with the coupling department of the Metal Products Division.

Ajax Flexible Coupling Co., Inc. — Westfield, New York

Poole Foundry & Machine Company — Baltimore, Maryland

John Waldron Corporation — New Brunswick, N. J.

American Flexible Coupling Co. — Erie, Pennsylvania (Zurn Industries, Inc.)

Philadelphia Gear Works, Inc. — Philadelphia, Pa.

Falk Corporation — Milwaukee, Wisconsin

Sier-Bath Gear & Pump Co., Inc. — North Bergen, N. J.

Thomas Flexible Coupling Co. — Warren, Pa.

T. B. Woods Sons Co. — Chambersburg, Pa.

Morse Chain Co. — Ithaca, New York

Link Belt Company — Chicago, Illinois

15. Koppers ran technical tests to compare the characteristics of competing couplings and the tests included Falk, Zurn (Amerigear) and Thomas.

16. Monthly reports submitted by Koppers' District Managers prior to the acquisition of Thomas by Koppers consistently referred to the competitive activities of Thomas agents.

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17. In July, 1958 one of Koppers district managers reported:

> Have received a trial order from Barkelew Electric Middletown, for #1 Model B on a rotary switch application. They are presently using Thomas Couplings for this.

18. In February, 1959 Koppers Western District Manager reported:

> Union Oil — Los Angeles
>
> Contact made in downtown central office (Union Oil Center) persons contacted R. X. Bungay, Engineer in Charge of new construction and Paul Grandell, assistant to Bungay. Key buying influence is Mr. Leroy Keller at Wilmington Refinery and he wants Thomas. All attempts (sic) to change this opinion have been thwarted.

19. In April, 1959 Koppers' Manager reported:

> W. A. Hoppe, local Thomas agent, has been into Pacific Pumps crowing about Stanvac Philippines. However, he got a jolt when he learned about Petrobras job. This man is a real bearer and has been in our hair for some years.

20. In September, 1959 the following report was made by Koppers Sales personnel:

> Competitive Activities
>
> Sier-Bath making an effort at aircraft companies. We have crossed Sier-Bath's trail on several occasions recently at local aircraft company installations.

Thomas and Amigear have been quite active in the northwest. Engineering indoctrination of our agent representatives must be accomplished to combat inroads made by these competitors.

21. In October, 1959 the followig was reported by Koppers sales manager:

Competitive Activities.

Falk appeared in recent process specification for unknown customer (C. F. Braun—contractor). Thomas continuing to go after steam plant, i.e., Glendale, Burbank, etc., on a "try us basis." Unfortunately the couplings have operated satisfactorily. We are doing all possible to upset this.

22. In December, 1959, Koppers received the following report from its Western Manager:

Business obtained at Union's Wilmington Refinery remains on a replacement basis only, and Union continues to admantly and steadfastly specify Thomas on most drives. Specifications currently issued verify this. We are still trying, both at the refinery, where the last word is said, and at the Engineering Office at the Union Oil Center in Los Angeles, with no tangible results.

23. In January, 1960 this report was submitted to Koppers by its salesman:

Competitive Activities

Most noticeable competitive activity in Southern California has again been by Sier-Bath, who have been contacting our key accounts and others in an effort to sell on price.

Thomas is supplying cooling tower couplings to OEM's for approximately 30 to 50% of our prices. They use a hollow zinc plated, carbon steel floating shaft.

24. In April, 1960 Koppers received the following report from its manager:

Connecticut Light & Power indicated they are trying all types of couplings at Norwalk Harbor Station (Falk, Thomas, Waldron, Fast's) to get comparative field data on ease of maintenance, life factors, first cost v. long run costs, etc.

25. In December, 1960 Koppers Western District Manager reported:

A. Competitive Activities: Jimmy Woodward of Pacific Pumps states that an increasing numer of specifications include Amerigear and Thomas. This of course, emphasizes the importance of selling the specifier.

26. In December, 1960, just prior to the acquisition, Koppers Southwestern District Manager reported:

Review of Target Accounts Humble Oil Corporation, Houston, Texas Behrings Bearing Service, Inc: Business increasing since opening new sites in Baytown. We are taking business away from Thomas. This will create a problem in 1961.

27. In April, 1960 Koppers Eastern manager made the following report:

Smith Discussed new design floating shaft for better competitive position with Falk and Thomas in pump and compressor field, with engineering in Baltimore.

28. Thomas manufactures a "floating shaft" type flexible coupling under its catalogue type SN.

29. Koppers manufactures a "floating shaft" flexible coupling.

30. In some applications using a "floating Shaft", it is possible to put one type of coupling on one end and a different type of coupling on the other end.

31. On October 21, 1960 Mr. Glen Werner, Vice President in Charge of Sales and Engineering for Thomas commented on the competition between gear and disc type couplings as follows:

> We cannot recall a single government agency or large commercial agency which has refused to accept gear type and Thomas couplings as basically equal. It is freely admitted that there are biased customers who will write us out of their request for bids. We add just as quickly that there are customers who write out the gear type coupling by simply stating "all metal non-lubricated" to exclude the gear type.
>
> * * * * * * *
>
> Further evidence is the "turn" of several former confirmed Gear Couplings users. In the last month we have added the names of New York's Consolidated Edison and Cincinnati Gas & Electric to the ever increasing list. This time not as specifiers on new equipment but the hard way—replacement of gear couplings which have failed. We received an order yesterday for 3 replacements for Cincinnati.

32. Competition existed between Koppers and Thomas in the sale of flexible couplings. Despite the engineering and design requirements of specific applications, there is a considerable area of overlap in which either gear or disc type couplings could be used sucessfully.

33. Selection of the type of coupling to be used in based on such diverse factors as price, availability, standardization within one given installation, design requirements, engineering detail, persistence of the salesman, preference expressed by the user of the machinery, reciprocity existing between the user and the coupling manufacturer, bias of the specifier of the coupling, specific problems on the application involved, and many others.

34. Specifications for flexible couplings often are worded to request a "gear type or equal", "disc type or equal", grid type or equal", or by the name of the manufacturer i.e., "Thomas or equal", "Fast's or equal", "Falk or equal" in such cases the individual companies attempt to prove to the specifier that they are equal.

35. Representatives of the firms in the industry attempt to sell the engineers and designers of machinery on the features of his own type of couplings.

36. Prior to the acquisition, Koppers sales effort was aimed at disparaging the disc type coupling and promoting the gear type coupling manufactured by Koppers.

37. Koppers sells its gear type flexible couplings for pumps, generators and diesels.

38. Thomas sells its disc type flexible couplings for pumps, generators and diesels.

39. Lovejoy Flexible Coupling Company manufacturers and sells jaw type flexible couplings for pumps, generators and diesels.

40. The Esso refinery in New Jersey used Thomas couplings and refused to use Koppers couplings while the Esso refinery in Baltimore used Koppers couplings and refused to use Thomas couplings although the same machinery was utilized in both plants.

41. Users of flexible couplings carry the purchase in their books as flexible couplings and by manufacturer's name but not by type of coupling.

42. Thomas' price lists were obtained by Koppers salesmen while keeping abreast of competitive activities.

43. In June, 1960 Koppers' Southwestern District manager reported:

> GENERAL PRODUCT INFORMATION
>
> Investigation into air cooler market in Tulsa, potential 500 couplings per year. We can beat Thomas prices now. This project will be covered in a special report. Couplings involved are Model B's $1\frac{1}{2}$ to $2\frac{1}{2}$.

44. Gear and disc type couplings are priced within the same competitive range.

45. The principal area of sales of flexible couplings ranges from bore sizes of $1\frac{1}{2}$ inches to bore sizes of 7 inches.

Opinion.

46. In the year 1959 Thomas sales of flexible couplings in bore sizes from 1½ inch to 7 inches accounted for 84.9% of all of Thomas sales.

47. In the year 1959 Koppers sales of flexible couplings in bore sizes from 1½ inch to 7 inches accounted for 82.6% of all of Koppers sales.

48. During the three year period, 1958, 1959 and 1960, Koppers and Thomas had 195 different companies as common customers.

49. In the year 1960, Koppers and Thomas had a total of 143 common customers.

50. Thomas sales to these common customers amounted to $1,256,767 or 73% of the total sales of Thomas for the year 1960.

51. Koppers sales of flexible couplings to these common customers in 1960 amounted to $3,234,957 or 48% of the total sales of Koppers flexible couplings in 1960.

52. All gear type couplings compete.

53. Poole Foundry & Machine Company manufactures a gear type Flexible coupling and is in competition with Thomas.

54. Zurn Industries manufactures a gear type flexible coupling and is in competition with Thomas.

55. Sier-Bath Gear and Pump Company manufactures a gear type flexible coupling and is in competition with Thomas.

56. The Falk Corporation makes a grid type flexible coupling and is in competition with both Thomas and gear type flexible couplings.

57. Koppers has stated that Thomas couplings are priced competitively with Sier-Bath and Falk with whom they compete.

58. Lovejoy Flexible Coupling Company manufactures a jaw type flexible coupling with a rubber resilient member between the jaws and considers its competitors to be anybody that manufactures a flexible couplings.

59. In 1958 the Bureau of the Census, Department of Commerce, conducted a Census of Manufacturers. In this census the value of shipments of flexible type couplings was compiled under product code 3566323.

60. In December, 1960, in response to a request from the Department of Justice, Koppers forwarded to the Department a letter giving the sales of flexible couplings for the year 1959 as compiled by "Iron Age" magazine. That compilation combined the sales of all types of flexible couplings under one product line.

IV. Section of the country

61. Koppers and Thomas each have sales representatives engaged in selling flexible couplings in the principal cities of the United States.

62. It is stipulated and agreed between the parties that the proper section of the country in which to measure the effects of this acquisition is the entire United States.

V Effects of the acquisition

63. Thomas is a profitable company, averaging in excess of $100,000 per year in profits during the period 1955-1959.

64. Koppers is one of the 500 largest manufacturing companies in the United States with sales in 1960 in excess of 300 million dollars.

65. Thomas is the largest exclusive manufacturer of flexible couplings in the United States in that Thomas is the largest firm in the United States manufacturing only flexible couplings.

66. Koppers is the largest manufacturer of flexible couplings in the United States.

67. Thomas' coupling is a highly regarded coupling with a well established market.

68. Prior to the acquisition, Thomas was a substantial active competitor in the manufacture and sale of flexible couplings.

69. As a result of the acquisition of Thomas by Koppers, actual and potential competition between these firms had been eliminated.

70. A survey of all flexible coupling manufacturers conducted by the Department of Justice showed that the total sales of flexible couplings in the year 1960 amounted to $29,375,519.

71. Koppers sales of flexible couplings in 1960 amounted to $6,739,721 which comprised 23% of the total.

72. Thomas sales of flexible couplings in 1960 amounted to $1,715,048 which comprised 5.8% of the total.

73. The combined Koppers-Thomas total sales amounted to $8,454,769 which accounted for 28.8% of all sales of flexible couplings in 1960.

7. Total sales of Koppers' flexible couplings for each of the years 1958, 1959 and 1960 were as follows (rounded figures):

1958	$5,700,000
1959	6,100,000
1960	6,700,000

75. Total sales of Thomas' flexible couplings for each of the years 1958, 1959 and 1960 were as follows (rounded figures):

1958	$1,460,000
1959	1,400,000
1960	1,700,000

76. In 1958 the four largest companies in the flexible coupling industry accounted for $13,839,000 or 56.5% of all flexible coupling sales.

77. In 1958 Koppers sales of flexible couplings accounted for $5.7 million or 41.5% of the big four total, and Thomas sales of flexible couplings accounted for $1.4 million or 9.8% of the big four total.

78. The combined Koppers-Thomas total was $7.1 million which was 51.3% of the big four total in 1958.

79. The twenty largest companies in the flexible coupling industry in 1958 accounted for $23,281,000 or 95% of all industry sales.

80. In 1960 the four largest companies in the flexible coupling industry accounted for $16,032,000 or 54.6% of all flexible coupling sales.

81. In 1960 Koppers sales of flexible couplings accounted for $6.7 million or 42.0% of the big four total and Thomas sales of flexible couplings accounted for $1.7 million or 10% of the big four total.

82. The combined Koppers-Thomas total was $8.4 million or 52.7% of the big four total in 1960.

83. The twenty largest companies in the flexible coupling industry accounted for $27,745,000 or 94.5% of all industry sales in 1960.

84. In the year 1960 the first twenty companies, or 32.8% of all flexible coupling manufacturers, had 94.5% of all flexible coupling sales. The remaining 41 companies, 67.2% of the total number of companies in the industry accounted for only 5.5% of the total sales.

85. Of the 61 companies in the flexible coupling industry in 1960, 44 companies had coupling sales of less than $250,000 and of these, 15 sold less than $10,000 in 1960, while only 10 companies had sales in excess of $1 million.

86. Koppers was able to sell flexible couplings to Birdsboro Steel Foundry & Machine Co. on the basis of reciprocity.

87. Koppers size and position as a large purchaser enabled Koppers to obtain sales it might not otherwise obtain on the basis of reciprocity. The addition of Thomas' purchases to those of Koppers increases the opportunity to engage in reciprocity.

88. Smaller flexible coupling manufacturers, Sier-Bath, Poole, and Zurn, stated that the acquisition will

add to Koppers already dominant position and make it more difficult for them to compete.

89. None of these small flexible coupling manufacturers had more than $10 million in total sales in 1960 and Poole had less than two million dollars in total sales.

90. Koppers has obtained access to Thomas' customer lists and thereby foreclosed competitors from effectively competing for this business.

91. Small companies are considering merging in order to be able to compete with the combined Koppers-Thomas Company.

92. One of the factors determining which coupling will be used is availablility.

93. In February, 1960 the following report was made by Koppers salesman:

> Competitive Activities
>
> Reports received from Oliver B. Lyman Co., from Kaiser Aluminum, Trentwood, and other customers that Poole is having serious delivery problems even on small standard types.

94. Prior to the acquisition, Thomas was also a small corporation with the same inventory and delivery problems as the other small companies.

95. Thomas with Koppers' financial resources will now be able to maintain a larger inventory and thereby obtain an advantage over its smaller competitors which it did not have prior to the acquisition.

96. As a result of the acquisition, Thomas will have available the financial resources of Koppers which in 1960 had sales in excess of $300 million.

97. With Koppers' resources, Thomas will have more money for research and development, more machinery, more advertising, and more marketing to the competitive detriment of smaller flexible coupling manufacturers.

98. Prior to its acquisition by Koppers, Thomas sold its couplings primarily through agents or representatives.

99. Koppers analysis of major accounts and the areas covered by Thomas' agents showed that the major portion of the Thomas business can be handled by the Koppers sales force with comparatively little added expenses and with major savings in commissions.

100. Koppers plans to eliminate approximately 70% of Thomas' agents and replace them with existing salesmen of Koppers' Metal Products Division.

101. Koppers anticipates that as a result of the change from Thomas' sales agents to Koppers' field sales force, they can save approximately $500,000 over the next few years.

102. Combining the Koppers' and Thomas' sales agents will substantially reduce Koppers' cost of doing business to the competitive disadvantage of its smaller rivals.

103. In addition to producing the gear type coupling under its trade name of "Fast's", Koppers also produces a rubber type coupling under the name "Holset."

104. In light of the physical differences between couplings some are more suitable for special applications than others. By acquiring Thomas, Koppers now has three principal types of flexible couplings available.

105. Since the acquisition, Koppers is able to offer three different types of couplings with the result that if a customer prefers a disc type rather than a gear type, Koppers will be able to still make that sale.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the defendants Koppers Company Inc., a corporation and over Thomas Flexible Coupling Company, Inc., a corporation, in this pending civil action.

2. The acquisition of the stock of Thomas by Koppers is within the contemplation of Section 7 of the Clayton Act.

3. The line of commerce involved in this acquisition is manufacture and sale of flexible couplings as a whole.

4. The section of the country in which to test this acquisition is the entire United States.

5. Acquisition of the stock of Thomas by Koppers will substantially lessen competition or tend to create a monopoly in the manufacture and sale of flexible couplings.

6. The acquisition of the stock of Thomas by Koppers violates Section 7 of the Clayton Act.

7. Further hearings, if necessary, will be conducted by the court to determine the appropriate relief to be granted.

Dated at Pittsburgh
this 9th day of January, 1962.

/s/ JOSEPH P. WILLSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

Defendants' Objections to Proposed Decree

COME NOW THE DEFENDANTS KOPPERS COMPANY, INC. and the THOMAS FLEXIBLE COUPLING COMPANY by their attorneys and enter the following objections to the proposed decree submitted by the Government:

1. The remedy of divestiture is unduly harsh under the circumstances of this case.

2. The equities of this case favor an alternative remedy to divestiture.

3. Alternative remedies to divestiture exist which can fully effectuate the purposes of Section 7 of the Clayton Act without working an undue hardship on the defendants.

4. The defendants request an additional thirty (30) days to propose such alternative remedies.

5. The proposed decree is unduly harsh in limiting Koppers Company, Inc. to a sale of the assets of the Thomas Flexible Coupling Company only. It ought to permit the sale of either the stock or assets of the Thomas Flexible Coupling Company.

6. The proposed decree is unduly harsh in setting a 6 month time limit on the sale of the Thomas Flexible Coupling Company. Such decree ought to incorporate

sufficient flexibility and safeguards to permit Koppers, if divestiture is finally ordered, to sell its interest in the Thomas Flexible Coupling Company without suffering great loss of money by a forced sale.

Respectfully submitted:

JOHN M. CRIMMINS
TEMPLETON SMITH
PAUL H. TITUS
Attorneys for Defendants

January 19, 1962

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

Memorandum in Support of Defendants' Objections to Proposed Decree

Points 1, 2 and 3

A fair reading of the most recent decision in *United States v. E. I. Du Pont,* 81 S.Ct. 1243 (1961), (Du Pont General Motors Case) reveals that divestiture is not the sole remedy applicale in a case arising under Section 7 of the Clayton Act. The Court's primary concern must be to fashion a remedy which will fully protect the public by effectively restoring competition

While it is true that divestitures is an effective remedy, the Supreme Court stated that it is not the only remedy which may be applied in a Section 7 case. In light of the findings and opinion rendered in the present case, the defendants feel that there are other remedies

which will as fully protect the public as divestiture and will also protect the private interests of the defendants.

The defendants believe that there are substantial equities in their favor which indicate that if a less drastic remedy than divesture can be found which does protect the public, that such less drastic remedies should be ordered.

As the testimony of Mr. Crook revealed the Thomas Company had to be sold under the terms of Mr. Thomas' will. Thus, this is not a case where the defendants set out to take over a going business, but rather one in which the defendant, Koppers, was offered the opportunity to buy a business which had to be sold to someone.

Two basic reasons led Mr. Crook to sell the Thomas Company to Koppers. First of all, for tax reasons, it was felt that Thomas stockholders would suffer a serious penalty if the Thomas Company was sold for cash. Thus, only a large company like Koppers which could acquire Thomas by means of a share for share transfer was considered by Mr. Crook. Secondly, Koppers Company was the only company which offered reasonable assurances that the plant and facilities of the Thomas Company would be kept in Warren, Pennsylvania. Thus, from the standpoint of the Thomas Company, they had a business which had to be sold. The only company to whom it could be sold and still protect its stockholders, its loyal employees and the City of Warren was Koppers Company, Inc.

On behalf of Koppers Company, Inc., it should be noted that prior to the acquisition of the Thomas Company, the Justice Department requested information from it on the proposed acquisition. Koppers gave the

Justice Department all the information which it possessed and asked the Department immediately prior to the acquisition if the Department had formed an opinion as to the legality of the merger. The Department said, however, that it was then unable to give any opinion and Koppers was forced to go ahead with their merger plans.

Finally, it should be noted that under a forced sale ordered by a divestiture decree Koppers may lose considerable money on such a sale, and may be required to sell the business in a transaction which would result in moving it from Warren.

Point 4

As was indicated above, the defendants believe that it is feasible to propose alternative remedies to divestiture. By way of example, partial divestiture, injunctive relief, or changes in the voting control over the Thomas Company are possible. However, in order to present a coherent workable alternative remedy, the defendants request leave to have an additional thirty (30) days in which to explore the business possibilities and to formulate a precise plan to present to the Court. As the Supreme Court indicated in the Du Pont case:

> ". . . The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial." 81 S.Ct. at 1248.

This case has been tried in record time and the Court rendered its decision promptly. The case itself is still less than one year old. In light of this, the defendants request this additional time in order to be able to give to the remedial stage of this case the full attention which it merits.

Memorandum.

Points 5 and 6

These two objections are almost self-explanatory. For if divestiture is to be ordered the defendants urge that no unnecessary limitations be placed on them which will cause them unnecessary harm. As the Supreme Court observed in the Du Pont case last May:

> "Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." 81 S.Ct. at 1250.

Thus, defendants urge that they not be restricted to a sale of assets only, if divestiture is ordered. Defendants further request that the decree be modified as to the time limit. Defendants urge that this decree at least be modified to give the defendants six (6) months in which to dispose of the Thomas Company on terms and conditions which will permit Koppers to sell the stock or assets of Thomas without suffering a loss. In the event that this is impossible, Koppers would then have six (6) months in which to finally dispose of the Thomas Company.

Conclusion

In submitting these objections to the proposed decree and in urging modification of the proposed decree, the defendants do not, of course, waive any objections which it has to the opinion and findings rendered in this case.

Respectfully submitted,

JOHN M. CRIMMINS
TEMPLETON SMITH
PAUL H. TITUS
Attorneys for Defendants

January 22, 1962

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

Order

Plaintiff, United States of America, having filed its complaint on February 17, 1961 and the defendants having appeared by their attorneys and filed their answers to such complaint and this Court having conducted a trial of the plaintiff's cause of action and having rendered its opinion thereon dated January 9, 1962 and said opinion containing the Court's Findings of Fact and Conclusions of Law, this 24th day of January 1962, it is hereby

ORDERED, ADJUDGED AND DECREED that:

(1) The acquisition by Koppers Company, Inc. of a controlling interest in Thomas Flexible Coupling Company on or about January 3, 1961 and the contracts ancillary thereto, were and are in vilolation of Section 7 of the Clayton Act (15 U.S.C. §18).

(2) The defendant shall within nine months of the date of this Order dispose of as a unit and as a going flexible coupling business all stock and assets of Thomas Flexible Coupling Company, tangible and intangible, which it acquired on January 3, 1961 and replacements thereof.

(3) Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to

apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification of any of the provisions thereof and for the enforcement of compliance therewith and punishment of violations thereof.

January 24, 1962

/s/ JOSEPH P. WILLSON
United States District Judge

Excerpt From pp. 14-15 of the Pretrial Conference Held September 14, 1961

Mr. Crimmins: I have just got this to say, your Honor, on the point you were making. I would suggest that we confine the issues to be presented in court here to whether or not there has been a violation of Section 7, leaving for future consideration, and if we reach that point, what would constitute an appropriate remedy.

Mr. McManus: Oh, yes.

The Court: That's right. We have yet to see whether the—

Mr. McManus: The relief should be entirely separate from the trial of the merits.

The Court: We won't talk about that until we make a determination, because the case might end, and that's the end of it.

Mr. Crimmins: Yes. If it does not end we would want to offer additional proofs, looking to the question of appropriate relief.

Mr. McManus: Yes.

The Court: Oh, yes. There will be a time for that. We won't worry about that.

Excerpt From pp. 2-5 of Transcript of Proceedings, Held on January 24, 1962

Pittsburgh, Pennsylvania,
Wednesday, January 24, 1962,
11:00 o'clock, P.M.

The Court: All right, sir, gentlemen.

Mr. Crimmins: If the Court please, this matter is is before Your Honor now upon the objections of the defendants to the form of injunctive relief as proposed by the Government. As the one proposing those objections, it appears that I have the burden of opening the argument.

I start with a legal proposition, and after a finding of a violation of Section 7 by the Court, the appropriate remedy is within the sound discretion of the trial Court. Divesture is not mandatory in these cases. I proceed from there to the argument upon the facts of this case—

The Court: Where has there been a Section 7 case since 1950, that there hasn't been a divesture? Do you know of one?

Mr. Crimmins: There has not been where there hasn't been a divesture, to my knowledge, but the legal principle is clearly enunciated in the DuPont case, both in the majority and the minority opinion.

I don't say—I say only, as a matter of law, divesture is not mandatory. Now, I urge upon the Court—

The Court: I think, Mr. Crimmins, I welcome—I want to hear your argument, but let me say this, though, I don't see any other remedy. I don't see any other rem-

edy. I can't see any other remedy. I think the law compells that, and that's the history of this type of legislation. I think it is just simply that, and if the Court reaches a conclusion, that is the only thing that follows.

Mr. Crimmins: May I put on the record a short statement of the considerations I urge upon the Court in support of my view, and then I will proceed on the theory that Your Honor is going to order divesture?

The Court: Yes.

Mr. Crimmins: All right. The points that we would want to put on, we want to urge that divesture is the most—is the harshest of the remedies that are available to the Court. We urge that it should be imposed only where the violation is certain, is known.

We urge in this case—the case is so close, that even the Department of Justice could not make up its mind within thirty days after facts were put to it about the proposed divesture.

We urge that this is not a predatory case, where we went out and gobbled up a competitor. The customer came to us—

The Court: Well, you had warning that it might not be approved.

Mr. Crimmins: I agree with that.

The Court: I mean, there is just—Look at both sides. You say one thing and it just occurred to me the other thing—You never had any approval, see.

Mr. Crimmins: I have never said that we had. I have said only that it was such a doubtful case, that the Government could not make up its mind.

The Court: Now, wait a minute. The Government doesn't make up its mind for the Court as to what the violation is, whether or not the law is violated. I think they might for themselves, but they don't do it for the Court.

Mr. Crimmins: I agree with that entirely, Your Honor.

But I say only this: If the Court has before it a doubtful case—

The Court: I don't think it is doubtful. I want to condition your mind to that, see. I say that very frankly.

Mr. Crimmins: Well, I have brought my wares to a market at which I can make no sale.

The Court: I am afraid that is right, Mr. Crimmins. I just want to see what it is. I think—I think we have got to go on the grounds of divesture. That is what is contemplated in the statute, that has to be the remedy, and it is a question of how soon and how we are going to do it.

Mr. Crimmins: All right. Without accepting the Court's—

The Court: Well, I know you are not accepting it. I don't suppose you will accept it until—

Mr. Crimmins: All right.

The Court: —maybe you will never have to accept it, I don't know.

Mr. Crimmins: All right. There are then two points that I want to urge upon the Court.

Office-Supreme Court, U.S.
FILED
JUN 4 1902
JOHN F. DAVIS, CLERK

SUPREME COURT, U.S.

No. 102

In the Supreme Court of the United States

October Term, 1901

KARPEL OBERNDORF, LEO, AND THOMAS FLEISHER
COPARTNERS DOING BUSINESS AS
OBERNDORF, FLEISHER & CO.,
APPELLANTS,

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS

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CITATIONS

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United States v. *du Pont & Co.*, 353 U.S. 586 — 6

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 932

KOPPERS COMPANY, INC., AND THOMAS FLEXIBLE COUPLING COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court which held that appellant Koppers Company, Inc. ("Koppers") violated Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, in acquiring the Thomas Flexible Coupling Company ("Thomas"), and ordered Koppers to dispose of its interest in Thomas.

Following a trial without a jury, the district court made detailed and specific findings of fact which, in-

sofar as pertinent here, may be summarized as follows: At the time of the acquisition of Thomas by Koppers in January 1961, both companies were engaged in the manufacture and sale of flexible couplings, which are used for the general purpose of transmitting power between machines by joining together rotating shafts. Flexible couplings serve three functions: (1) coupling shafts for mechanical power transmission, transferring the torque of one shaft to the other, directly and with constant velocity; (2) compensating for all types of misalignment between shafts without inducing stresses and loads on the connected equipment and without a tangible loss of power; and (3) compensating for end or axial movement of the coupled shafts, preventing either shaft from exerting a thrust on the other and allowing each to rotate on its normal axial position. There are various types of flexible couplings, such as gear, disc, grid, jaw and chain, each of which performs the same aforementioned functions but uses a different method to achieve its flexibility (J.S. 42). Prior to the merger, Koppers manufactured and sold the gear-type flexible coupling only and Thomas the disc-type (J.S. 42).

Koppers is a highly diversified organization with total sales in 1960 in excess of $300 million. It conducts its business through eight operating divisions, one of which is its Metal Products Division. The Metal Products Division is in turn divided into various departments, one of which is the Coupling Department which manufactures and sells flexible couplings from its plant in Baltimore, Maryland.

through sales representatives located in the principal cities of the United States (J.S. 41). Koppers is the largest manufacturer of flexible couplings in the United States. In 1960 its sales of flexible couplings amounted to $6,739,721, which comprised 23% of total industry sales of all types of flexible couplings (J.S. 53).[1]

Prior to its acquisition, Thomas manufactured flexible couplings in its plant in Warren, Pennsylvania, which it sold through representatives located in the principal cities in the United States (J.S. 41). Thomas was the largest firm in the United States manufacturing only flexible couplings and the fourth largest in the industry (J.S. 53). It had sales in 1960 amounting to $1,715,048, which comprised 5.8% of the total industry sales (J.S. 54).

By acquiring Thomas, Koppers increased its already dominant position as the largest manufacturer of flexible couplings. The combined Koppers-Thomas total sales in 1960, the year prior to the acquisition, amounted to $8,454,769, or 28.8% of all sales of flexible couplings in that year (J.S. 54). Total industry sales in 1960 amounted to approximately $29,400,000 (J.S. 43), of which the twenty largest companies accounted for $27,745,000, or 94.5%, and the four largest companies (including Koppers, first, and Thomas, fourth) accounted for 54.6%. Of the 61 companies in the

[1] Koppers' share of the market for flexible couplings has been steadily increasing. In 1958 its sales were approximately $5,700,000, which represented 20.5% of total industry sales. In 1959 Koppers' sales of flexible couplings had increased to over $6,100,000, or 21.6% of total industry sales (Edgs. 13, 74; J.S. 43, 54).

flexible coupling industry in 1960, 44 companies had coupling sales of less than $250,000, while only ten companies had sales in excess of $1 million (J.S. 55).

On these facts the district court held that the "acquisition of the stock of Thomas by Koppers violates Section 7 of the Clayton Act" (J.S. 58). Its holding rested on specific conclusions with respect to (1) line of commerce; (2) section of the country; and (3) competitive effect of the acquisition. The court found that the appropriate line of commerce in which to test the competitive effects of the acquisition was the flexible coupling industry (J.S. 22, 24) and that, as stipulated between the parties, the appropriate "section of the country is the whole United States" (J.S. 24). With regard to the competitive effects, the district court found that: (1) Koppers has increased its percentage of the flexible coupling market from 23% to 28.8%; (2) Thomas has been eliminated as a substantial competitor and the competition heretofore existing between them has been destroyed; (3) the ability of smaller manufacturers to compete with the combined Koppers-Thomas Company has been substantially lessened; (4) Koppers' already dominant position in the industry has been enhanced; and (5) the total effect of the merger will "certainly" tend to lessen competition in the flexible coupling industry (J.S. 39–40).

Subsequent to the rendition of the district court's opinion on January 9, 1962, the government submitted a proposed order requiring Koppers to divest itself of the assets of Thomas within six months. Appellants filed objections to the proposed order and

a hearing was held on January 24, 1962. At that time the court heard argument on the proposed order and ruled that Koppers must divest itself of all the stock and assets of Thomas, as a unit and as a going flexible coupling business, within nine months from the date of the order (J.S. 64-65).

ARGUMENT

The main issue in the present case is whether the acquisition of Thomas, the fourth largest producer of flexible couplings, by Koppers, the largest producer of flexible couplings, violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. In holding that it did, the district court found that: (1) flexible couplings had "sufficient peculiar characteristics and uses" to constitute a line of commerce within the meaning of Section 7 of the Clayton Act (J.S. 22); (2) the appropriate "section of the country" was, as the parties had stipulated, the entire United States (J.S. 24); and (3) the effect of the acquisition "is to substantially lessen competition in the sale of flexible couplings throughout the United States" (J.S. 39), by eliminating "Thomas * * * as a substantial competitor [of Koppers]" and by enhancing "Koppers' already dominant position in the industry" (*ibid.*).

While the jurisdictional statement sets forth five "Questions Presented," appellants later recite that "[e]ssentially this case raises two important problems * * * [*viz.*,] * * * the line of commerce appropriate to a case like the present * * * [and] * * * the right of a defendant in a civil antitrust action to

a hearing and to introduce evidence on the question of the remedy" (J.S. 9). We shall show that neither aspect of the court's holding raises an "important problem."

1. *Line of Commerce.* The district court, following the rule laid down by this Court in *United States* v. *duPont & Co.*, 353 U.S. 586, 593–594, properly held that "flexible couplings have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other products as to make them a line of commerce within the meaning of the Clayton Act" (J.S. 22). Its finding is clearly correct. Thus, the court noted that while "[a]ll flexible couplings are not identical * * *, [t]here is no disagreement whatsoever by any of the witnesses as to the function and purpose of the flexible coupling" (*ibid.*). The court specifically found that though using different principles to achieve flexibility, the "various types of flexible couplings * * * [serve] the function of connecting rotating shafts, transmitting power from the driving to the driven member and while so doing compensating for minor degrees of misalignment" (Fdg. 7, J.S. 42). The court noted also that the testimony "by the witnesses in the industry shows that the gear, disc, rubber, jaw and chain type flexible couplings are all regarded as products of a general classification, that is flexible couplings" (J.S. 23), and that in the Engineers' Digest, "the whole field of flexible couplings is encompassed in an article * * * entitled 'Flexible Couplings'" (*ibid.*).

While appellants do not in terms assail this finding of "line of commerce" as "clearly erroneous,"[2] in essence their jurisdictional statement presents that issue. Thus, they point to a survey by the Vice President of Thomas, which indicated that "only 8.19 per cent of the total sales made by Thomas in 1960, were in possible competition with the Koppers gear type couplings" (J.S. 6), and ask this Court to decide whether, in light of this survey, Thomas and Koppers could be in the same line of commerce (J.S. 10).

The short answer to appellants' question is that the court in effect rejected the survey[3] when it found that there was substantial competition between Koppers and Thomas, stating (J.S. 32–33):

> As to the competition between the couplings, this court believes that the evidence in this

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[2] In their questions presented appellants have challenged both the court's findings on line of commerce (J.S. 3–4), and the court's failure to use their sales survey in determining the line of commerce (J.S. 4), but appellants have argued only the latter point as ground for review by this Court.

[3] The "survey" was made in the following fashion by the vice president of Thomas: he decided that certain types of couplings were "non-competitive to Fast [Koppers]" (Tr. 206) and that his sales records readily showed that such couplings accounted for 61.9% of Thomas 1960 dollar sales (Tr. 213); to determine what portion of the remaining 38.1% of Thomas sales were non-competitive, a sample consisting of 1,000 orders out of a total of 12,827 orders was examined (Tr. 213–215).

It was brought out on cross-examination that the vice president of Thomas, who conducted the "survey," had no previous experience in sampling methods, was not familiar with sampling techniques used by experts (Tr. 238); and that, contrary to accepted sampling techniques, the sample was made by selecting 1,000 consecutive sales orders, rather than by random samples over the entire year (Tr. 252–54).

> case is practically conclusive that it is only in the sizes under 1¼" in diameter and in areas where no lubrication is required that the [Koppers] and Thomas couplings do not compete. But the evidence shows that the bulk of Thomas sales is in the other sizes where competition exists. Also, it is shown that there is practically no installation of a gear type coupling where a Thomas coupling will not do the job. * * *

The evidence on which the court relied included documents from Koppers' own files, referring to the competitive activity of Thomas (Fdgs. 14–27, J.S. 44–47), as well as a letter written by G. C. Werner, Vice-President of Thomas, shortly before its acquisition by Koppers, in which he stated to a customer: "We cannot recall a single government agency or large commercial agency which has refused to accept gear type and Thomas couplings as basically equal" (J.S. 36). It was Werner who conducted the post-acquisition survey upon the basis of which appellants now seek to upset the trial court's findings.[4]

In any event, since the district court found that flexible couplings were a line of commerce, it did not have to consider whether there were or could be narrower categories within flexible couplings which might themselves be a line of commerce. As was stated in *Crown Zellerbach Corp.* v. *Federal Trade*

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[4] Appellants' contention that the court erred in treating the Werner survey too narrowly (J.S. 4) is not supported in the record. The court's opinion (J.S. 33) discusses that survey in connection with the purpose for which it is now pressed: the extent to which there was substantial competition between Koppers and Thomas (see the heading at J.S. 28).

Commission, 296 F.2d 800, 812 (C.A. 9), pending on petition for certiorari, No. 890, this Term: "In the statutory phrase 'in any line of commerce', the word entitled to emphasis is 'any'. *Any* line of commerce does not mean the same as the entire line of commerce, or all lines of commerce engaged in or touched upon by the acquired concern." See also *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 595 (S.D.N.Y.).

Further, whatever the amount of competition found to have existed between Koppers and Thomas, other findings by the district court show that the acquisition here violated Section 7. The court expressly found that "the ability of smaller manufacturers to compete * * * has been substantially lessened" (*ibid.*); that "Koppers' already dominant position in the industry has been enhanced by obtaining Thomas customer lists which competitors do not have" (*ibid.*); that "the entire engineering and manufacturing services of the Koppers organization is now available in the industry for not only the Fast coupling [manufactured by Koppers] but to promote the Thomas coupling as well." (*id.* at 40); and that "[s]uch a result inevitably will squeeze the smaller manufacturers" (*ibid.*). From these findings, which appellants do not question, the court concluded that "[t]he total effect of the merger will certainly tend to lessen competition in the coupling industry" (*ibid.*). These subsidiary and ultimate findings as to the impact of the merger upon the remaining competitors lie outside what appellants set forth as the substantial questions raised. Standing alone, they

would fully support the judgment below (see *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D.N.Y.); H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8).

2. *The Remedy.* Appellants contend that the district court erred in ordering divestiture without affording them an opportunity to present alternate remedies and in holding that the only remedy permitted by law was complete divestiture (J.S. 4). There is no merit to either contention.

In *United States* v. *duPont & Co.*, 366 U.S. 316, 328, 331, this Court expressly stated that "complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7 * * * [Divestiture] should always be in the forefront of a court's mind when a violation of § 7 has been found." This position has been reaffirmed recently in *California* v. *Federal Power Commission*, No. 187, this Term, decided April 30, 1962, in which the Court said (slip opinion, pp. 6–7, fn. 4):

> * * * As to the remedy we stated in *United States* v. *duPont & Co.*, 366 U.S., at 334: "We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."

Following delivery of the court's opinion, appellants were afforded fifteen days in which to present materials concerning "the appropriate relief to be

granted" (J.S. 58). Appellants filed objections to the government's proposed decree (J.S. 59) and a memorandum of law supporting those objections (J.S. 60-63). Alternative remedies to divestiture could have been presented by appellants at that time, but were not. Instead, appellants argued that divestiture was "unduly harsh" and that alternative [redacted] remedies existed (J.S. 59), and they asked for an additional thirty days to describe them. After giving appellants an opportunity to present oral arguments, the court modified the proposed decree to take account of several of their objections, recited that it could "see" no alternative remedy, and, rejecting appellants' request for an additional thirty days to propose alternative remedies, ordered divestiture.

Such action was not an abuse of the court's discretion, and presents no substantial question for this Court's review. In light of this Court's statements in *duPont* that "complete divestiture is peculiarly appropriate" (366 U.S. at 328); that "courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests" (*id.* at 326); and that "all doubts as to the remedy are to be resolved in [the government's] favor" (*id.* at 334), it was clearly proper for the trial court to direct divestiture and to reject appellants' request for additional time to present undisclosed "alternative remedies."

[redacted]

[1] In response to appellants' objections, the court extended the time for divestiture from six to nine months (J.S. 59-60, 64) and permitted the sale of both stock and assets of Thomas (J.S. 59, 64).

Appellants' claim that the district court "erroneously concluded that it had no alternative to ordering divestiture" (J.S. 10) is similarly without substance. The court maintained an open mind towards all possible remedies. In its opinion (J.S. 58) the court stated that "Further hearings, if necessary, will be conducted * * * to determine the appropriate relief to be granted." In fact, as noted, a hearing was held and appellants were afforded an opportunity to present whatever materials they desired with respect to the decree. However, although they filed objections to the remedy proposed by the government (J.S. 59–60) and a memorandum in support of those objections (J.S. 60–63), they failed at any time to offer the court any meaningful description of what alternative remedies they might wish to propose (J.S. 62).

It is in light of these facts that the court's statement during oral argument on the proposed decree—"* * * I welcome—I want to hear your argument, but let me say this, though, I don't see any other remedy. I can't see any other remedy. I think the law compels [divestiture] * * *" (J.S. 67–68)—must be understood. The court was not then ruling, as appellants contend, that the only remedy permitted by law was complete divestiture. It was only advising appellants of its view that in light of the findings of fact in the case, the proof adduced by the government, the Supreme Court's statements in *duPont* that divestiture is the "natural remedy" for violations of Section 7 of the Clayton Act (366 U.S.

at 329), and in the absence of concrete alternatives proposed by appellants, divestiture appeared to be the appropriate remedy.

CONCLUSION

The decision below is correct, and this appeal presents no questions warranting further briefs and oral argument. The judgment of the district court should be affirmed.

Respectfully submitted.

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JUNE 1962.

In *duPont*, this Court rejected the government's argument that courts must order divestiture whenever they find a violation of Section 7 of the Clayton Act (366 U.S. at 328, n. 9). The court below was well aware of this express ruling, since it was cited in appellants' post-trial memorandum (J.S. 60), and again on oral argument immediately before the court's statement quoted above (J.S. 67).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 888

KOPPERS COMPANY, INC., and THOMAS FLEXIBLE COUPLING COMPANY, Appellants

v.

UNITED STATES OF AMERICA, Appellee

On Appeal From the United States District Court for the Western District of Pennsylvania

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 932

KOPPERS COMPANY, INC., and THOMAS FLEXIBLE COUPLING COMPANY, Appellants

v.

UNITED STATES OF AMERICA, Appellee

On Appeal From the United States District Court for the Western District of Pennsylvania

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, the Appellants file this Brief In Opposition To The Government's Motion to Affirm.

THE LINE OF COMMERCE INVOLVED IN THIS CASE

The basic difficulty with the analysis and discussion of the line of commerce problem in the Motion to Affirm is that it does not reach the essential question, which is whether or not the Thomas disc type coupling actually competes substantially in the market place with the Koppers gear type coupling. Principal reliance is placed on the fact that there is a common definition which em-

braces both types of couplings and that there is a general industry classification which includes both types. Definitions and industry classifications however are labels only and may not be used as a substitute for a factual determination of whether or not products do in fact compete.

Four basic types of proof were submitted by the government and adopted by the district court in finding that disc type couplings and gear type couplings belong in the same line of commerce: (1) Stress is laid upon the fact that a common definition can be laid down which encompasses both types of couplings (M.A. 2, 6).[1] On this basis, the district court made a finding that "flexible couplings have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other products as to make them a line of commerce within the meaning of the Clayton Act" (J.S. 22). (2) A second factor relied upon in finding that disc type couplings and gear type couplings compete within the same line of commerce was that the Thomas Flexible Coupling Company and Koppers Company, Inc., made sales to a large number of common customers (J.S. 38). (3) The government urged that various studies indicated that the Thomas Company and Koppers Company made a large percentage of their sales of gear and disc type couplings for use on machinery having the same bore sizes (J.S. 38). The district court adopted these studies as proving or tending to prove that competition existed

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1. The argument advanced by the government and adopted by the court that: "the whole field of flexible couplings is encompassed in an article * * * entitled, 'Flexible Couplings'", appears to be but another interesting variant of the same argument.

between gear and disc type couplings. (4) Finally, the court relied on the fact that some few statements had been made by various witnesses including officials of Koppers and Thomas, indicating that "competition" existed between the two firms. (J.S. 32, 36, 37).

The appellants have no quarrel with the types of proof offered. We assert that they do not prove the essential fact required to be proved by the government, namely, that there was substantial competition between these two types of couplings in the market place. They do not go to the essential question of the quantum of competition between the two product lines. The government's argument in the Motion to Affirm ignores and the district court ignored the actualities of the market place which are essential to a proper resolution of the market problem in a case arising under Section 7 of the Clayton Act.

Since Section 7 of the Clayton Act is concerned with corporate mergers or acquisitions, a consideration of what constitutes "a line of commerce" arises under this section of the law only in terms of an acquisition or merger. Given such an acquisition or merger, the court's first task is to find "the area of effective competition" *United States v. DuPont and Co.*, 353 U.S. 586, 593. In order to perform this task the court must look to the companies involved and to their products. The very term used by the courts in discussing "line of commerce" questions, that is, the term, "relevant market", suggests that the market to be studied in any given case is the market which is relevant to the acquiring and the acquired firms' business.

An examination of the cases which have arisen under Section 7 of the Clayton Act will show that the courts have made precisely the approach of first looking to the products made or sold and bought by the companies involved in the merger or acquisition. Having made this examination, the courts have then proceeded to consider whether there were common lines of commerce involved. Thus, in *United States v. duPont*, 353 U.S. 586, this Court started with the fact that duPont produced automobile fabrics and finishes which were purchased by General Motors. This line of products became the relevant market for inquiry and since these common product lines had sufficient peculiar characteristics and uses to distinguish them from fabrics and finishes in general, they were deemed to constitute a line of commerce. Obviously in that case the fact that duPont was a major producer of cellophane and chemicals, and that General Motors was a major producer of cars, trucks and even household appliances was irrelevant because there was no indication that any of these product lines were bought from or sold to each other.

This same approach to the line of commerce problem was taken in *Crown Zellerbach Corp. v. Federal Trade Commission*, 296 F. 2d 800, 807 (C.A. 9), pending on petition for certiorari, No. 800, this Term:

> "We begin with what the record shows as to how St. Helens operated; what products it sold; where it sold those products; to what extent this constituted competition with the petitioner and others; what other producers were selling the same products in the same market; and, relative to all other suppliers of these products in the same area,

how much of a competitive factor St. Helens was. Of course the patterns of trade carried on by St. Helens alone do not furnish the entire answer in our effort to discover the patterns of trade in the paper industry which were followed in practice, from which the Board must determine the relevant market; but what St. Helens produced and sold in competition with other paper manufacturers, and particularly in competition with the petitioner, furnishes the best place to begin; and it is manifest that generally speaking we must find the relevant market product-wise in those products in which St. Helens was a significant factor before the merger. *Thus St. Helens produced no newsprint nor fine paper, and plainly enough, those types and grades do not figure here.*" (Emphasis supplied.)

Similarly, in *United States v. Bethlehem Steel*, 168 F. Supp. 576 (S.D.N.Y. 1958) both of the firms involved in the merger were major steel producers. The court found that *both* firms produced hot rolled sheets, cold rolled sheets, hot rolled bars, track spikes, tinplate, butt-weld, pipe, seamless pipe, oil field equipment and supplies. With respect to these items the court pointed out:

> "[E]ach has unique physical characteristics, is distinct from one another, has different end uses, and is recognized by steel producers and consumers as a distinct product. Each has its own competitive standards and markets. Finally there are no effective substitutes for any of them." Id. at 593.

Accordingly, each of these product lines was held to be "a line of commerce" within the meaning of Section 7 of the Clayton Act. The court then went on to consider

whether the iron and steel industry, itself, might not be an appropriate line of commerce for purposes of that case. The approach and reasoning of Judge Weinfeld on this issue is deserving of close scrutiny. He stated:

> "The products of the iron and steel industry as a group are generally standardized; are not subject to the vagaries of style appeal, and have peculiar characteristics and uses for which there are no effective substitutes. The manufacture of such products requires special know-how and experience, huge capital investment and a trained labor force. The products of the iron and steel industry are generally distinct one from the other and as a group distinct from the products of other industries. They are sold in a recognized market with its own competitive standards. The iron and steel industry is commonly recognized by its members as well as the community at large as a separate industry. It has its own trade association, treating the industry as separate and distinct. In light of these facts the conclusion is warranted that the sum of all the products of the iron and steel industry constitute a line of commerce. *Since Bethlehem and Youngstown both produce and sell the principal products of the iron and steel industry, it is an appropriate line of commerce for analyzing the effect of this merger.*" Id. at 593-94. (Emphasis supplied)

Had the district court, in this case followed the approach of Judge Weinfeld, a wholly different result would have been obtained.

Prior to the questioned merger, Koppers manufactured and sold a gear type flexible coupling, while

Thomas manufactured and sold a disc type flexible coupling. These were the only two relevant product lines involved in this acquisition. The question before the court was, therefore, whether or not these two product lines belonged in the same or different "lines of commerce".[2] The law requires and sound reasoning dictates, that in order to determine whether two different products belong in the same line of commerce, an inquiry must be made into the economic realities of the market or markets involved. As was pointed out in *United States v. Brown Shoe Co.*, 179 F. Supp. 721, 730 (E. D. Mo. 1959), pending on appeal No. 4 this Term:

> "An analysis of the maze of cases on the subject leads one to the conclusion that a 'line of commerce' cannot be determined by any process of logic and should be determined by the processes of observation (citation omitted) . . ."

The facts established at trial in this case reveal that there existed a number of differences between the disc type flexible coupling and the gear type flexible coupling. These two types of couplings are physically quite dis-

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2. Appellants recognize that had Koppers and Thomas both been producers of gear type couplings and disc type couplings then following the rational of *United States v. Bethlehem Steel*, 168 F. Supp. 576 (S.D.N.Y. 1958) it would have been appropriate for the district court to have examined the impact of this merger on the larger market comprised of these two product lines. Indeed if Koppers and Thomas had both been producers of gear type couplings alone, the government's position in this case would undoubtedly be that gear type couplings constitute a "line of commerce" in themselves, as opposed to all other types of flexible couplings.

similar (J.S. 29), and function quite differently in achieving flexibility (J.S. 29). Testimony from both government and defense witnesses indicated that a large number of significant engineering differences existed between these two types of couplings.[3] It was against the background of these recognized engineering differences

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3. Some of the significant differences from an engineer's standpoint which were shown to exist between gear type couplings and disc type couplings are:

   A. The disc type coupling is non-lubricated while the gear type coupling requires a lubricant (J.S. 30). Thus on applications where the presence of a lubricant is undesirable the gear type coupling simply cannot be used.

   B. The disc type coupling is free from backlash (i.e., reversing forces or movements within the coupling) while the gear type coupling does have backlash.

   C. The disc type coupling is a torsionally stiff coupling while the gear type coupling is a torsionally indeterminate coupling (Tr. 300-303). Thus on applications where torsional vibrations create problems within the mechanical system these two types of couplings have very different characteristics (Tr. 290, 298, 300-303).

   D. On certain high speed applications the gear type coupling stays in balance while the disc type does not (Tr. 362-363).

   While there are other differences appearing in the record the important factors which appellants wish to stress are that both gear type couplings and disc type couplings are highly engineered, precision-made industrial products which may sell for as much as thousands of dollars apiece, and that there are sound engineering reasons which underlie the fact that there is less than 10% competition between the two product lines.

between disc and gear type couplings, that the appellants' witness, Mr. Werner, conducted a survey of the actual sales of the Thomas Company made during 1960. The purpose of this survey was to ascertain the actual percentage of sales of disc type couplings manufactured by Thomas which were in *possible* competition with the Koppers gear type coupling[4]. The results of the survey, as the appellants pointed out in the Jurisdictional Statement, reveal that only 8.19% of the total sales made by Thomas in 1960 were possibly competitive with the Koppers gear type coupling.

This is the only evidence in the record in this case on the *quantum* of competition between these two product lines.[5] And this evidence was not even discussed by the court in deciding on what was the line of commerce involved in this case. After concluding on definitions, semantics and the literature that there was only one line of commerce involved, the court then turned to the quantum of competition in its consideration of the *effect* of the acquisition on competition. The government contends that the district court in effect rejected this survey. The district court (J.S. 31-32) could not under the

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4. Mr. Werner was testifying as an engineer whose qualifications were never disputed by the government that for engineering reasons the vast majority of coupling sales made by Thomas were for use on applications on which a gear type coupling could not be used.

5. At page 8 of the Motion to Affirm reference is made to certain correspondence as showing that the two types of couplings were in competition. We think that the statements are entitled to little if any weight on the question of competition, since they so obviously represent only puffing by salesmen.

law have rejected this survey on the record in this case. No government witness purported to make a study of the amount of competition existing between gear type couplings and disc type couplings. There is no basis for doubting the accuracy or credibility of the witness. Under such circumstances this Court has held that the testimony of one skilled in the business that no real competition exists between the products "should be accepted" *International Shoe v. Federal Trade Commission*, 280 U.S. 291, 299.

The appellants contend the district court committed clear error in making the finding that it had not been established on the record that the purchase of couplings is primarily determined by engineering considerations (J.S. 4 Question 2). The fact is that every witness who testified about the subject of who controls the purchasing of flexible couplings stated that the purchasing of flexible couplings by the customers in the market place was controlled by trained engineers (Tr. 147, 303-304, 335, 340, 356). There was no contrary testimony offered. This question was not argued in the Jurisdictional Statement since it is essentially a subsidiary issue on the "line of commerce problem".

We therefore submit that the trial court erred substantially in basing its ultimate finding that there was only one line of commerce involved here on definitions, semantics and literature; in not even considering the *quantum* of competition between these two product lines in reaching this ultimate finding; and in not reaching the ultimate finding that there were two product lines because the only pertinent evidence in the record on the question of *quantum* of competition showed that there was less than 8.19% per year.

We now turn to the government's contention that the ancillary findings described on pages 9 and 10 of its Motion independently support the judgment below, whatever the amount of competition between the two product lines. These findings are based on the assumption that there was one line of commerce involved in the case within which all of these companies competed. The government errs in believing that these findings can determine this case without regard to the amount of competition between the two product lines involved here. If there were no competition between the two product lines, obviously they would constitute two separate lines of commerce and these findings as to competition would fall. It is obvious that the court in adopting them did not consider the acquisition involved to be a conglomerate one. The court considered it to be a horizontal one. That being true, the ancillary findings cannot independently support the decree if the basic conclusion of the type of merger involved is erroneous.

Thus, appellants submit that a substantial legal problem exists in the line of commerce aspects of this case which ought to be resolved by this Court.

THE REMEDY

Appellants do not dispute the legal propositions set forth in the cases cited by the government in its Motion to Affirm bearing on the question of the appropriate remedy in a case arising under Section 7 of the Clayton Act. Appellants contend that a fair reading of the Judge's ruling on the argument concerning the remedy (J.S. 67-69) reveals that the district court was ruling that the law permitted no alternative remedy to divestiture.[6] This, appellants contend, constitutes clear error on the part of the district court.

One further aspect of the government's argument on the "remedy" problem of this case deserves comment. The government seems to assert that the appellants were guilty of laches for failure to propose workable alternatives to divestiture at the argument on January 24th. However, the facts are that the district judge filed his lengthy Opinion and Findings of Fact on January 10, 1962, (J.S. 13-58). On January 17th, the government filed its proposed decree. On Friday, January 19th, the following order of the district judge was filed:

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6. The district court was quite explicit in its ruling at two different points in the brief discussion that was, in Counsel's opinion, stretched to the permissible limits of advocacy:

   A. "I can't see any other remedy. I think the law compels that, and that's the history of this type of legislation. I think it is just simply that, and if the Court reaches a conclusion, that is the only thing that follows" (J.S. 68).

   B. "I think we have got to go on the grounds of divestiture. That is what is contemplated in the statute, that has to be the remedy" (J.S. 69).

"AND NOW, this 18th day of January, 1962, the United States having submitted a proposed final decree, a hearing is directed to be held on Wednesday, January 24, 1962, at 11:00 A.M., at which time defendants will be heard on any objections to the proposed decree as submitted."

On Tuesday, January 23rd, the appellants' objections to the decree (J.S. 59-60) were filed and prior to the hearing on January 24th, the appellants' supporting memorandum of law (J.S. 60-63) asking for reasonable time to propose and to support alternative remedies was filed.

Appellants urge that in light of the surrounding circumstances they acted timely in asserting their right to a hearing on the question of the proper remedy. This hearing was never afforded appellants due to the district judge's conclusion and ruling that the law permitted no alternative to divestiture.

CONCLUSION

For the reasons stated, the appellants urge that the government's Motion to Affirm be denied, and urge that this Court note probable jurisdiction in this case.

Respectfully submitted,

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